

DOCUMENT RESUME

ED 456 477

CS 510 617

AUTHOR Packard, Ashley
TITLE Copyright or Copy Wrong: An Analysis of University Claims to Faculty Works.
PUB DATE 2001-08-00
NOTE 52p.; Paper presented at the Annual Meeting of the Association for Education in Journalism and Mass Communication (84th, Washington, DC, August 5-8, 2001).
AVAILABLE FROM For full text: <http://list.msu.edu/archives/aejmc.html>.
PUB TYPE Reports - Evaluative (142) -- Speeches/Meeting Papers (150)
EDRS PRICE EDRS Price MF01 Plus Postage. PC Not Available from EDRS.
DESCRIPTORS Academic Freedom; *College Faculty; Content Analysis; *Copyrights; Court Litigation; *Higher Education; *School Policy

ABSTRACT

Most universities claim to own at least some faculty-created works. This paper explores ownership of faculty-created intellectual property by examining copyright cases that have touched on faculty ownership of their work, the teacher exception to the work-for-hire doctrine and its relationship to academic freedom, and university copyright policies. It concludes that faculty members have little protection for their work other than university copyright policies that may not alter the traditional work for hire arrangement set up by the Copyright Act. (Contains 192 notes. An appendix lists the 70 universities whose copyright policies were examined.) (Author/RS)

Copyright or Copy Wrong: An Analysis of University Claims to Faculty Works

Paper presented at the annual convention of the Association for
Education in Journalism and Mass Communication, Law Division, August 2001

Correspondence to:

Ashley Packard, Ph.D.
Assistant Professor of Communication
University of Houston – Clear Lake
2700 Bay Area Blvd., Box 456
Houston, Texas 77586
Voice: (281) 283-2572
Fax: (281) 283-2569
packard@cl.uh.edu

U.S. DEPARTMENT OF EDUCATION
Office of Educational Research and Improvement
EDUCATIONAL RESOURCES INFORMATION
CENTER (ERIC)

☒ This document has been reproduced as
received from the person or organization
originating it.

☐ Minor changes have been made to
improve reproduction quality.

• Points of view or opinions stated in this
document do not necessarily represent
official OERI position or policy.

PERMISSION TO REPRODUCE AND
DISSEMINATE THIS MATERIAL IN MICROFORM
AND IN ELECTRONIC MEDIA FOR ERIC
COLLECTION SUBSCRIBERS ONLY
HAS BEEN GRANTED BY

A. Packard

BEST COPY AVAILABLE

2A TO THE EDUCATIONAL RESOURCES
INFORMATION CENTER (ERIC)

Copyright or Copy Wrong: An Analysis of University Claims to Faculty Work

ABSTRACT

Most universities claim to own at least some faculty-created works. This paper explores ownership of faculty-created intellectual property by examining copyright cases that have touched on faculty ownership of their work, the teacher exception to the work for hire doctrine and its relationship to academic freedom, and university copyright policies. It concludes that faculty have little protection for their work other than university copyright policies that may not alter the traditional work for hire arrangement set up by the Copyright Act.

INTRODUCTION

In a small southern university, three professors grapple with intellectual property issues. The first is afraid to allow his syllabi to be posted on an academic program Web site because he fears he might lose the copyright to his classes. The second wants to know how to protect her rights to an online course she plans to develop for the university's instructional technology program. The third is angry because the university wants a share of the profits from software he created that has proven to be highly marketable.

These concerns are not unusual. Faculty all over the country are wondering about the impact technology will have on their intellectual property rights now that electronic learning seems to be the wave of the future. By 2002, it is estimated that 2.2 million college students – 15% of all higher education students – will take distance courses.¹ By 2002, 85% of four-year colleges will offer distance education courses.²

Faculty are feeling pressure to develop Web sites incorporating course materials, to offer online courses and to develop educational software as universities move to take advantage of new revenue opportunities by targeting distance learners. Also, some universities have simply begun to take more of an interest in the financial dimensions of the faculty work product.³ In 1999, the top 100 research universities earned more than \$862 million in royalties from faculty inventions, compared to \$725 million in 1998.⁴

¹See U.S. COPYRIGHT OFFICE, REPORT ON COPYRIGHT AND DIGITAL DISTANCE EDUCATION 10, 19 (1999) (visited March 15, 2000) <http://www.idc.com/Data/Consumer/content/CSB020999PR.htm> (citing International Data Corp., *Distance Learning Takes Off, Fueled by Growth in Internet Access*, (Press Release, Feb. 2, 1999).

²See *id.*

³See Rochelle Cooper Dreyfuss, *The Creative Employee and The Copyright Act of 1976*, 54 U. CHI. L. REV. 590, 591-92 (1987). See also, Julianne Basinger, *Universities' Royalty Income Increased 33% in 1997, Reaching \$446 Million*, CHRON OF HIGHER EDUC., Jan. 8, 1999, A51.

⁴See Association of University Technology Managers Licensing Survey 2 (1999) (visited March 18, 2001) <http://www.autm.net>.

Universities already generating substantial revenue from faculty patents are now beginning to consider the income that might be generated from faculty copyrights.

Traditionally, many faculty have assumed that their creative works are their own, but several influential law review articles have suggested the opposite.⁵ Moreover, many professors can hardly help but notice that their universities are issuing policies claiming rights to at least some of their creative work. Some university policies claim ownership of all faculty-generated work; others universities cede all rights to copyright ownership in faculty work to the professors unless the university specifically commissioned the work and paid extra for it.⁶ But most universities fall in the middle, claiming some rights to faculty work and forfeiting others.⁷ Meanwhile, some universities are still in the stages of developing their copyright policies.⁸

This article attempts to answer questions faculty may have regarding their rights to the academic work they create, particularly to work presented in a digital format. It begins by examining copyright cases that have touched on faculty ownership of work, including those cases that have addressed a teacher exception to the work for hire doctrine. The article then explores the current state of academic freedom for university faculty and its relationship to university ownership of faculty work. Following this section is a discussion of university copyright policies on faculty work, which is based on data gathered from a content analysis of sixty-nine university policies.⁹ Data gathered from this analysis informs guidelines presented in the next section to help faculty maintain some control over their digital work. The final section presents the conclusion that faculty actually have little protection for their work other than university copyright

⁵See *infra* note 19 and accompanying text.

⁶See *infra* notes 104-33 and accompanying text.

⁷See *id.*

⁸See *infra* note 102 and accompanying text.

⁹This article discusses intellectual property policies only as they relate to copyright law. A discussion of patent law is outside the scope of this article.

policies that may not alter the traditional work made for hire arrangement set up by the Copyright Act.

COPYRIGHT LAW'S GENERAL RELATIONSHIP TO FACULTY WRITINGS

Most educators assume that copyright law guarantees them the copyright to their articles and courses.¹⁰ Actually no such guarantee exists. In fact, the letter of the law implies the opposite – that faculty writings should belong to universities under copyright law's work-for-hire provision. To understand why this is so, it is important first to understand how copyright law applies to scholarly work and what the work-for-hire doctrine means in relation to the right.

Copyright law draws its power from the Constitution. Its purpose is "to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."¹¹ This justification of copyright's intent is particularly applicable to faculty whose work is generally intended to add to the body of scholarly knowledge.¹²

Congress implemented the first copyright statute in 1790. Since its inception, United States copyright law has undergone numerous revisions. The last major revision of the Act was in 1976. The Act now states that, "copyright protection subsists...in original works of authorship fixed in any tangible medium of expression."¹³ This clause

¹⁰See Philip T.K. Daniel & Patrick D. Pauken, *The Impact of the Electronic Media on Instructor Creativity and Institutional Ownership Within Copyright Law*, 132 EDUC. L. REP. 2 (1999) ("Faculty...have assumed that they have had the academic freedom to independently author articles, books, scholarly presentations, scientific inventions, course syllabi and the like without interference or ownership by the university or school.").

¹¹U.S. CONST., art. I, § 8., cl. 8.

¹²See Russ VerSteeg, *Copyright and the Educational Process: The Right of Teacher Inception*, 75 IOWA L. REV. 381 (1990) ("...teachers, however, often fashion creative educational materials not so much for financial gain, but for the satisfaction of the endeavor for its own sake and the pride that flows from seeing an original idea come to fruition and achieve a specific educational objective.").

¹³17 U.S.C. § 102(a) (1999).

ensures that works created, displayed, reproduced or disseminated in the physical as well as the digital realm are protected by copyright.

The Copyright Act states that initial ownership of a work vests in the author of the work.¹⁴ Registering the work with the Library of Congress is no longer required.¹⁵ In fact, it need not even bear a copyright notice. The moment it is created, the work belongs to the creator.¹⁶ Naturally, faculty members might assume that as authors of their scholarly work, they would hold the copyright to it.

The notion of scholarly authorship is complicated, however, by the Copyright Act's work-for-hire provision. The Copyright Act defines a work made for hire as "a work prepared by an employee within the scope of his or her employment."¹⁷ It further states that "In the case of a work for hire, the employer or other persons for whom the work was prepared is considered the author for purposes of this title, and unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright."¹⁸

¹⁴17 U.S.C. § 201(a) ("Copyright in a work protected under this title vests initially in the author or authors of the work.").

¹⁵17 U.S.C. § 408(a) Supp. V. (1993). Further, on March 1, 1989, the United States joined the Berne Convention, an international agreement to protect intellectual property. One of the effects of the agreement is that citizens of all its member nations enjoy full copyright protection on their intellectual works in each of the member nations, whether or not their works display an official copyright notice.

¹⁶*But see* 17 U.S.C. § 411(a) (noting that a work does, however, need to be registered before a suit for copyright infringement can proceed) and 17 U.S.C. § 412 (noting that certain remedies, such as attorneys' fees and punitive damages, are available to a copyright holder only if the work is registered before an infringement occurs or within three months after the first publication).

¹⁷17 U.S.C. § 101 (Alternatively, subsection (2) defines a work made for hire as "a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.").

¹⁸17 U.S.C. § 201(b).

Many scholars have interpreted this to mean that faculty, as university employees, are creating works made for hire when they produce academic materials and scholarly articles, and that the university, as employer, is actually the owner of those works.¹⁹

The 1976 Copyright Act does not define "employee" or "employer" in the statute. Initially this led to some confusion among the various federal circuit courts, which defined the terms differently.²⁰ The Supreme Court attempted to resolve the discrepancy in 1989, in *Community for Creative Non-Violence v. Reid*.²¹ The case involved the work of an artist who was commissioned to create a statue to illustrate the plight of the homeless. When the sculptor refused to allow the statue to go on tour, the organization that commissioned it sued. Both parties filed competing copyright claims. The sculptor argued that for copyright purposes he was an independent contractor; the plaintiff argued that the statue was a work made for hire.

To determine if the work-for-hire provision applied, the Court first had to establish whether the sculptor was an employee or an independent contractor under the Copyright Act. The justices wrote "in the past, when Congress has used the term 'employee' without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine."²² The Court relied on criteria from the Restatement of Agency, to assess

¹⁹See Dreyfuss, *supra* note 3, at 591 ("[T]he 1976 Act permits universities to claim copyright to, and even 'authorship' of, their faculty's output."); Leonard D. DuBoff, *An Academic's Copyright: Publish or Perish*, 32 J. COPYRIGHT SOC'Y 17, 18 (1984)(arguing that §201(b) of the Copyright Act is general enough to make every academic article a work for hire); and Todd Simon, *Faculty Writings: Are They Works Made for Hire Under the 1976 Copyright Act?*, 9 J.C. & U.L 485, 508 (1982-83)("Unless the courts create an exception, nothing prevents a college or university from laying claim to copyright in faculty writings under the traditional works made for hire analysis.").

²⁰See Gregory K. Laughlin, *Who Owns the Copyright to Faculty-Created Web Sites?: The Work-for-Hire Doctrine's Applicability to Internet Resources Created for Distance Learning and Traditional Classroom Uses*, 41 B.C.L. REV. 549, 567.

²¹490 U.S. 730 (1989).

²²*Id.* at 739-40.

whether a hired party was an employee.²³ These were: the hiring party's right to control the manner and means by which the work is accomplished; the skill required to do the work; the source of the instruments and tools used to perform the work; where the work is done; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment for the work; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.²⁴ The Court added that "No one of these factors is determinative."²⁵ In weighing them together, however, it found in favor of Reid.

Although *Reid* did not address the copyrights of faculty, its definition of "employee" is arguably applicable to professors trying to determine whether their work falls within the scope of the work-for-hire provision. Faculty generally work without supervision, select their own research topics, determine what methodology to use and decide where to present their results. However, universities do exert control over faculty work. Most universities insist that their faculty publish scholarly articles and books to earn tenure or raises.²⁶ Scholarly work is expected to take place within a certain field of specialty, and to meet a certain level of quality and frequency.²⁷ The claim of employment is even stronger if the professor's employment contract stipulates a research and writing requirement.²⁸ Moreover, universities usually bear the cost of faculty research, including "supplies, offices, personnel, telephones, furniture, computers,

²³*Id.* at 751.

²⁴RESTATEMENT (SECOND) OF AGENCY § 220(2).

²⁵490 U.S. at 751 (1989).

²⁶*See* Simon, *supra* note 18, at 502.

²⁷*See id.*

²⁸*See id.* at 503.

research aides and travel fees."²⁹ Faculty usually have long-term employment contracts with their universities. Faculty earn a regular salary for teaching a set number of courses. Teaching is the regular business of a university. Universities supply a product, higher education, that brings in considerable revenue. Moreover, universities provide faculty with employee benefits and withhold taxes from faculty paychecks.

Using these criteria, faculty members appear to be employees operating under the work-for-hire doctrine. Consequently, universities would be entitled to claim the copyright to professors' intellectual work, unless professors could prove their creative work fell outside the scope of their employment. Because the work-for-hire provision applies to work done "within the scope of ...employment,"³⁰ professors able to show that their creative work falls outside the scope of their employment could avoid the provision, regardless of whether they are employees for purposes of the Copyright Act.

To determine whether a work falls within the scope of employment, courts also rely on the Restatement of Agency. Its three-part test asks: 1) whether the work is of the type that the employee is employed to perform; 2) whether the work occurs substantially within authorized work hours; and 3) whether its purpose, at least in part, is to serve the employer.³¹ Again, the agency test appears to encompass faculty work. Professors are expected to produce scholarly research for tenure and promotion, and academic materials, such as syllabi, course notes and exams, for use in class instruction. It would be difficult for faculty to argue that these materials are not, at least in part, produced in service to the university. And, while it may be true that faculty schedules are somewhat liquid, allowing them to work when it is convenient for them, and thus outside of the standard

²⁹*Id.* at 504.

³⁰17 U.S.C. § 101.

³¹*See City of Newark v. Beasley*, 883 F. Supp. 3, 7 (D.N.J. 1995) ("The Restatement (Second) of Agency § 228 (1958) sets forth a three part test for determining if an employee's conduct is within the scope of his employment.").

work day suggested by the test, the same could be said of university schedules in general. As classes are taught at night and on weekends, it is harder to argue that there is a specific notion of authorized work hours for professors on university campuses.

Some cases indicated that courts might take a fairly broad view of what constitutes work done in service to the employer. In *Marshall v. Miles Laboratories, Inc.*³², for example, a federal district court held that the copyright to an article written by an employee on his own time, on his home computer, belonged to his employer because it fell within the scope of his employment. The employee argued that he wrote the article at home on his own initiative and received no additional compensation. But the court noted that research for the article was done at work, the employee had discussed the article with one of the employer's scientists at work who was also listed as a co-author, and the employer had paid for the employee to present the article at a symposium. In finding that the copyright belonged to the employer, the court also noted that the employee's job description included development, summarization and reporting of "information about advances in technology" to the employer.³³

THE TEACHER EXCEPTION TO THE WORK FOR HIRE DOCTRINE

There is some support for the notion that a teacher exception to the work-for-hire doctrine protects faculty rights to their academic works.³⁴ The work-for-hire doctrine was

³²647 F. Supp. 1326, 1331 (N.D. Ind. 1986).

³³*Id.*

³⁴See, e.g., Daniel & Pauken, *supra* note 10, at 11 ("The Copyright Act, by strict application, still vests exclusive control in universities instead of scholars. However, this has not been borne out by the caselaw...there is an academic exception to the basic work for hire doctrine...."); Laura Lape, *Ownership of Copyrightable Works of University Professors: The Interplay Between the Copyright Act and University Copyright Policies*, 37 VILL. L. REV. 223, 246 (1992) ("[T]he 1976 Act did not disturb the professors' exception from the work-made-for-hire doctrine; to the extent that such an exception ever existed, it continues to exist."); Laughlin, *supra* note 20, at 583 ("Absent Congressional action, courts should recognize a teachers' exception to the work-for-hire doctrine."); and VerSteeg, *supra* note 12, at 397 ("[I]f prior law is the appropriate guide, courts should continue to recognize the ... 'teacher exception'").

first codified in the Copyright Act of 1909.³⁵ Under the 1909 law, "courts and commentators regarded the work for hire doctrine as largely inapplicable to teachers."³⁶ The leading authority on copyright law, Melville Nimmer, subscribed to the view that professors owned the copyright to scholarly work because "courts fashioned a 'teacher exception' to the work for hire rules."³⁷

Nimmer drew his conclusion that common law supported a teacher's exception to the work-for-hire doctrine from two cases, *Sherrill v. Grieves*³⁸ and *Williams v. Weisser*.³⁹ Both cases "considered the work made for hire concept with respect to professors but did not find works made for hire, in large part due to policy and custom."⁴⁰

Sherrill v. Grieves was the first case in the United States that recognized an exception to the work-for-hire doctrine for a professor's academic work. Sherrill was a military instructor, who taught military sketching, map reading and surveying and also wrote a textbook on these subjects on his own initiative. Prior to the book's publication, he allowed the United States Army to print a pamphlet incorporating a section from his book. Grieves, the defendant, later wrote two books on military sketching that incorporated sections of the pamphlet. Grieves argued that Sherrill did not own the copyright to the pamphlet because it was produced as a work for hire. The Supreme Court of the District of Columbia disagreed, holding that Sherrill's pamphlet was not a work for hire. The court added that a professor is not obliged to reduce his or her lectures to

³⁵See Act of March 4, 1909, ch. 320, Pub. L. No. 60-320, 35 Stat. 1075 (1909).

³⁶Dreyfuss, *supra* note 3, at 591.

³⁷*Id.* at 597. See also 1 NIMMER ON COPYRIGHT at Sec. 5.03[B][1][b][i] and Sec. 5.03[B] n.31.

³⁸57 Wash. L. Rep. 286 (D.C. Cir. 1929), 20 Copyright Office Bulletin 675 (Dist. of Columbia Supreme Court 1929). This court no longer exists. Congress transferred its duties to the U.S. District Court for the District of Columbia.

³⁹78 Cal. Rptr. 542 (Ct. App. 1969).

⁴⁰Lape, *supra* note 34, at 233.

writing; if he or she does so, then the lectures do not become the property of the employing institutions.⁴¹

Williams v. Weisser also recognized a professor's right to retain the copyright to his lectures. Williams, an anthropology professor at UCLA, sued Weisser, the owner of Class Notes, a college note-taking service, under California's common law of copyright for infringing on the copyright to his lectures. Weisser hired students to attend classes and take lecture notes that he later reproduced and sold to students. Each set of notes was stamped with the words "Copyright 1965, Class Notes." Weisser argued that Williams lacked standing to sue him because UCLA owned the copyright to Williams' lectures. The trial court said Williams "did not lose his literary right to the lectures because his employment may have furnished him with the opportunity or occasion for utilizing his prior learning and education and knowledge acquired in his chosen field of Anthropology."⁴²

The trial court also noted that a copyright policy statement sent out by the university before Williams was hired was of "paramount importance" to its decision because the letter relinquished any property rights that the university might have had in professors' lectures.⁴³ The court concluded that this policy statement was part of the university's contract with any instructor hired after it was disseminated.

Basing its decision on the academic exception precedent established in *Sherrill*, the California Court of Appeals affirmed the trial court's decision in *Williams*.⁴⁴ Citing the university's lack of supervision and control, the absence of motive for the university to own the copyright, and the undesirable impact university ownership would have on

⁴¹57 Wash. L. Rep. at 394-395.

⁴²153 U.S.P.Q. 866, 867 (Cal. Super. Ct. 1967).

⁴³*Id.*

⁴⁴78 Cal. Rptr. 542 (Ct. App. 1969).

faculty movement from one school to another, the court concluded that Williams owned the common law copyright to his lectures.⁴⁵

The decision in *Williams* is also noteworthy because "it appears to have recognized that academic tradition, which had always assumed that professors owned the copyrights to their works, was incongruous with copyright law and its attendant work for hire doctrine."⁴⁶ The court pointed out that "'university lectures are *sui generis*' as a unique kind of intellectual product, they should not, 'absent compulsion by statute or precedent,' be automatically treated like other intellectual products that employees create."⁴⁷ But, as one commentator notes, "*Williams* has not played a prominent role in copyright opinions, probably because there are so few cases dealing with professors under the work-for-hire doctrine...*Williams* has lived on more in commentaries than in court."⁴⁸

A third case, *Weinstein v. University of Illinois*,⁴⁹ also supports the teacher exception, but only because professor ownership of creative works was recognized by the plaintiff's university and incorporated into his teaching contract. Weinstein, the plaintiff, was a professor of pharmacy administration who sued his co-authors and university because a co-author revised an article they had written and published it in an academic journal, listing Weinstein as third author rather than first. Weinstein argued that the defendants had distorted his work and stolen credit for it by listing his name last rather than first. The federal district court held that Weinstein's article was a work for hire and

⁴⁵*Id.*

⁴⁶Russ VerSteeg, *supra* note 12, at 395 (1990).

⁴⁷Georgia Holmes & Daniel A. Levin, *Who Owns Course Materials Prepared by a Teacher or Professor? The Application of Copyright Law to Teaching Materials in the Internet Age*, 2000 BYU EDUC. & L. J. 165, 176 (2000) (citing *Williams*, 78 Cal. Rptr. at 547).

⁴⁸Simon, *supra* note 19, at 498.

⁴⁹811 F.2d 1091 (7th Cir. 1987).

that, consequently, the copyright belonged to the University of Illinois, which could do whatever it wanted with the work.⁵⁰

But the Seventh Circuit Court of Appeals reversed.⁵¹ The court concluded that when Weinstein was told that he needed to write scholarly articles for tenure, he was not being told that it was a "requirement or duty" of his job within the meaning the university's copyright policy.⁵² The court also noted that if the university had owned the copyright to the article, the co-authors would have required the university's consent to publish it.

The *Weinstein* court recognized that copyright's work-for-hire provision is "general enough to make every academic article a 'work for hire' and therefore vest exclusive control in universities rather than scholars."⁵³ But the court also noted that academic tradition vests copyright ownership in scholars and interpreted the meaning of the employment contract with that tradition in mind.⁵⁴ Other cases have used custom as a basis for interpreting an employment contract. In *May v. Morganelli Heumann & Associates*,⁵⁵ for example, the Ninth Circuit stated that if a practice is known to the parties and widely held, "the custom is an implied in fact term of the contract" between the parties.⁵⁶ However, the legislative history of the Copyright Act suggests that Congress did not intend custom to be considered in cases interpreting the work-for-hire doctrine.⁵⁷

⁵⁰*Id.* at 1093.

⁵¹The judges on the appellate panel included Richard D. Cudahy, Frank H. Easterbrook, and Richard Posner, all former law professors. See *Almanac of the Federal Judiciary*, Vol. 2, (1999).

⁵²*Weinstein*, 811 F.2d at 1094.

⁵³*Id.*

⁵⁴*Id.*

⁵⁵618 F. 2d 1363 (9th Cir. 1980).

⁵⁶*Id.* at 1368.

⁵⁷See DuBoff, *supra* note 19, at 33 and Simon, *supra* note 19, at 493 (arguing that the legislative history of the 1976 Copyright Act suggests Congress was disturbed by uncertainty resulting from courts' application of custom, intent and assumptions to rebut the work for hire presumption).

In dictum, Seventh Circuit Judge Richard Posner, an influential commentator within the legal field, also has supported the continuation of a teacher exception to the work-for-hire doctrine. In *Hays v. Sony Corp. of America*, two high school teachers sued Sony for infringing upon the copyright to a manual they had written explaining how to use their school's word processors.⁵⁸ When the school district bought new word processors from Sony, it gave the company the manual and asked Sony to modify it for use with Sony's word processors. Sony created a similar manual that incorporated verbatim sections of the teachers' original work. On appeal, the Seventh Circuit concluded that the issue was not properly before the court because the plaintiffs had sued under Illinois common law of copyright, which was abolished by the 1976 Copyright Act. However, Judge Posner used the opportunity to discuss the state of the teacher exception to the work for hire doctrine.

He said:

Until 1976, the statutory term "work made for hire" was not defined, and some courts had adopted a "teacher exception" whereby academic writing was presumed not to be work made for hire. [*Citations omitted.*] The authority for this conclusion was in fact scanty, . . . but it was scanty not because the merit of the exception was doubted, but because, on the contrary, virtually no one questioned that the academic author was entitled to copyright his writings. Although college and university teachers do academic writing as part of their employment responsibilities and use their employer's paper, copier, secretarial staff and (often) computer facilities in that writing, the universal assumption and practice was that (in the absence of an explicit agreement as to who had the right to copyright) the right to copyright such writing belonged to the teacher rather than to the college or university.⁵⁹

⁵⁸847 F. 2d 412 (7th Cir. 1988).

⁵⁹*Id.* at 416.

Judge Posner noted reasons for the exception. These included lack of university supervision of the academic's writing. He also stated that the reasons for the exception "are as forceful today as they ever were."⁶⁰ He added

Nevertheless it is widely believed that the 1976 Act abolished the teacher exception [*citations omitted*] – though, if so, probably inadvertently. . . . To a literalist of statutory interpretation, the conclusion that the Act abolished the exception may seem inescapable. . . . But considering the havoc that such a conclusion would wreak in the settled practices of academic institutions, the lack of fit between the policy of the work-for-hire doctrine and the conditions of academic production, and the absence of any indication that Congress meant to abolish the teacher exception, we might, if forced to decide the issue, conclude that the exception has survived.⁶¹

Judge Posner's comments are sometimes cited as evidence that a teacher's exception still exists.⁶² As dictum, however, they are not binding authority.

ACADEMIC FREEDOM AND THE TEACHER EXCEPTION

Of all the arguments postulated against the notion of university ownership of faculty work, none is more persuasive than the notion of academic freedom. Academic freedom is the three-pronged belief that "teachers are entitled to full freedom in research and in the publication of their results," "to freedom in the classroom in discussing their subject," and to "be free from institutional censorship or discipline" for speaking or writing as citizens.⁶³

⁶⁰*Id.*

⁶¹*Id.*

⁶²See Laughlin, *supra* note 20, at 577; VerSteeg, *supra* note 12, at 405; and Todd Borow, *Copyright Ownership of Scholarly Works Created by University Faculty and Posted on School-Provided Web Pages*, 7 U. MIAMI BUS. L. REV. 149, 166 (Winter, 1998).

⁶³American Association of University Professors, *1940 Statement of Principles on Academic Freedom and Tenure*, <<http://www.aaup.org/1940stat.htm>>.

As one legal scholar has pointed out, "The First Amendment value of academic speech rests on its commitment to truth... its honesty and carefulness, its richness of meaning, its doctrinal freedom and its invitation to criticism."⁶⁴ Academic speech, perhaps more than any other type of speech, fits within the traditional marketplace of ideas rationale for First Amendment protection, epitomizing the theory's strengths while minimizing its traditional weaknesses.⁶⁵ The primary purpose of academic speech is the search for truth. This search usually takes the form of theoretical development in the classroom and through scholarly writings. These theories are then put out into the marketplace, usually by circulating them at academic conferences and in scholarly journals. And while scholarly conferences and journals are not freely accessible to every voice, limitations on inclusion of ideas are not based on financial resources, but rather on intellectual resources. Most scholarly articles are peer reviewed. Scholars in the same field assess the quality and rigor of the research behind each article to ensure that it meets acceptable academic standards. A controversial idea is not a basis for disqualification, as long as the idea is supported by research. This means that the marketplace of scholarly research is open as long as the ideas are well researched and presented. The purpose of

⁶⁴J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment"*, 99 YALE L.J. 251, 259-60 (1989).

⁶⁵See Walter Metzger, *Profession and Constitution: Two Definitions of Academic Freedom*, 66 TEX. L. REV. 1265, 1279, (citing the American Ass'n of Univ. Professors, Declaration of Principles (1915), reprinted in ACADEMIC FREEDOM AND TENURE app. A, 157-76, 167-68 (L. Joughin ed. 1969)) (explaining that the original American Association of University Professors' Declaration of Principles, outlining academic freedom, described a true university as an "intellectual experiment station, where new ideas may germinate and where their fruit, though still distasteful to the community as a whole, may be allowed to ripen until finally, perchance, they may become a part of the accepted intellectual food of the nation or of the world.") But see, Paul Brest, *Protecting Academic Freedom Through the First Amendment: Raising the Unanswered Questions*, 66 TEX. L. REV. 1359, 1360 n. 5 ("To the degree that professional scholars, in the formation and promulgation of their own opinions, are, or by the character of their tenure appear to be, subject to any motive other than their own scientific conscience and a desire for the respect of their fellow-experts, to that degree the university teaching profession is corrupted; its proper influence upon public opinion is diminished and vitiated; and society at large fails to get from its scholars, in an unadulterated form, the peculiar and necessary service which it is the office of the professional scholar to furnish.").

discussing these ideas at conferences and in journals is none other than the hope that those ideas which are the best will rise to the top.

In the early twentieth century, as the idea of the modern university evolved in America and scholars began to embrace scientific methodology in both natural and social sciences, academics began to resist evaluation of scholarly thought by nonacademic boards of trustees. "Professors simultaneously demanded that no ideological test be applied to their work and that evaluation be performed by professional peers."⁶⁶ Pursuit of scientific knowledge served as a justification for the demand. Faculty argued that opinions of lay persons were not scientific and that lay interference with scientists would only retard the discovery of truth.⁶⁷

Borrowing from German ideas, in 1915, the nascent American Association for College Professors argued for the establishment of academic freedom in American universities. The association envisioned academic freedom as a way of wresting control over academic research and teaching from the administrative sphere.⁶⁸ The crux of the association's argument was the denial of the traditional master-servant relationship in academic employment. The association asserted that "whatever their legal status, [faculty] were the appointees, not the employees, of their governing boards, that though they owed certain duties to these authorities, the faculty's primary responsibility was to the public, and that with respect to 'independence of thought and utterance . . . -though not in other regards - the relation of professor to trustees may be compared to that between judges of the Federal courts and the Executive who appoints them.'"⁶⁹

⁶⁶Byrne, *supra* note 64, at 273.

⁶⁷*See Id.*

⁶⁸*See id.* at 268-69 ("The structural elements that would give shape to academic freedom were established early: legal control by non-academic trustees; effective governance by administrators set apart from the faculty by political allegiance and professional orientations; dependent and insecure faculty.").

⁶⁹Metzger, *supra* note 65, at 1279 (citing the American Ass'n of Univ. Professors, Declaration of Principles (1915), reprinted in *ACADEMIC FREEDOM AND TENURE* app. A, 157-76, 163 (L. Joughin ed. 1969)).

Bestowing the copyright for academic writings on universities, based on the work-for-hire doctrine's concept of the master-servant relationship, puts academic speech right back into the hands of university administration. Because copyright law grants multiple rights to the owner of a work – the right to reproduce it, disseminate it, make derivative works from it, display it publicly, and perform it publicly – the entity with the copyright has the ability to control the use of the work. Once a university owned the rights to a professor's article, the university would determine if the professor could send it to a journal or not, or even to other colleagues for review. The university would determine whether a journal could publish it or not. And the university would determine whether the professor could go back to the work and make revisions or new works based on the original. In all of these cases, the university would have the power to say no. It would have the power to keep the piece out of the scholarly marketplace and to prevent it from being used as the basis for further projects. Universities would determine whether the work of art, theater or dance professors, was suitable for public display or performance. If the university decided the works were unsuitable for any reason, it could prevent the works from being released. This power to control academic expression goes to the heart of academic freedom and the First Amendment.

Unfortunately, although the Supreme Court and lower courts have shown support for the notion of academic freedom in universities, their support is largely focused on the need of universities to be free of government control, rather than professors' needs for freedom of expression. Court notions of academic freedom appear to be primarily institutional, rather than individual in nature.⁷⁰

⁷⁰The few cases in which courts have supported academic freedom for individuals have involved school teachers instead of university professors. In the context of higher education, the right of academic freedom is primarily institutional. See, e.g., Byrne, *supra* note 64, at 257 ("[T]he Court has developed a concept of constitutional academic freedom as a qualified right of the institution to be free from government interference in its core administrative activities, such as deciding who may teach and who may learn. Why the First Amendment protects administrative activities at some remove from teaching and scholarship has

In 1957, the Supreme Court first appeared to recognize a right of academic freedom.⁷¹ In *Sweezy v. New Hampshire*, the Court reversed the contempt conviction of a Marxist economist who refused to answer questions about the content of lectures he had given as a part-time instructor at a state university.⁷² Although the plurality did not decide the case on First Amendment grounds, it noted that the state's inquiry not only harmed the "petitioner's liberties in the area of academic freedom" but the freedom of "the community of universities."⁷³ In his concurring opinion, Justice Frankfurter wrote that the state's questions regarding the defendant's lectures not only interfered with his exercise of constitutional rights, but also constituted an impermissible "government intrusion into the intellectual life of a university."⁷⁴ Oddly, though, instead of supporting the statement by citing either the AAUP's 1915 declaration on academic freedom for professors, or its revised version from 1940, Frankfurter cited a statement from South African academics outlining the four essential freedoms of a university – to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.⁷⁵

In *Keyishian v. Board of Regents*, the Supreme Court was more expansive in its praise for the academic freedom of instructors. It also noted the utilitarian value of academic freedom to society by pointing out that teachers train future leaders to think by exposing them to a variety of ideas. It said:

yet to be adequately justified.") and Metzger, *supra* note 65, at 1319 ("All in all, the number of First Amendment cases that explicitly mention academic freedom or that are in a line that links them to academic freedom cases is rather small, and of that reduced number, a considerable proportion does define academic freedom in institutional terms.").

⁷¹*Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

⁷²*Id.*

⁷³*Id.* at 250 (Warren, J.)(plurality opinion).

⁷⁴*Id.* at 261 (Frankfurter, J., concurring).

⁷⁵*Id.* at 263 (quoting a statement of conference of senior scholars from Universities of Cape Town and Witwatersrand).

Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." The classroom is peculiarly the "market place of ideas." The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, [rather] than through any kind of authoritative selection."⁷⁶

But further discussion by the Court indicates that it was not focusing on the individual rights of teachers, but rather on the impact of the state law in question on schools as institutions. In *Keyishian*, the Court struck down a New York statute that made individuals ineligible for employment in public schools if they belonged to an organization declared by the board of regents to advocate the overthrow of government by illegal means.⁷⁷ The Court decided the case on the basis of vagueness and overbreadth, rather than a specific right of academic freedom. Moreover, while it extolled the virtues of academic freedom, it shied away from defining its concept of academic freedom, leaving other courts to flounder in its wake.⁷⁸

Sweezy and *Keyishian* set the tone for a line of cases that have been long on praise for academic freedom, but short on holdings that apply the right to academics rather than

⁷⁶*Id.* at 603 (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960) and *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)(citations omitted).

⁷⁷385 U.S. 589 (1967).

⁷⁸*Byrne*, *supra* note 64 at 253 (1989) ("Lacking definition or guiding principle, the doctrine [of academic freedom] floats in the law, picking up decisions as a hull does barnacles."); Metzger, *supra* note 65, at 1289 ("A sizeable literature of legal commentary asserts that the Supreme Court constitutionalized academic freedom without adequately defining it." *See also*, *Wison v. Chancellor*, 418 F. Supp. 1358, 1362 (D. Or. 1976) ("Few courts have considered whether and to what extent the First Amendment protects academic freedom... Lower courts have spoken more frequently [than the Supreme Court], but none has clearly defined the theory's legal contours.") and *Urofsky v. Gilmore*, 216 F.3d 401, 411 (2000), *cert denied* 121 S. Ct. 759 (2001) ("Academic freedom' is a term that is often used, but little explained, by federal courts.").

universities. Take, for example, *University of California v. Bakke*,⁷⁹ a case that considered the constitutionality of giving preferential treatment to minority college applicants. In his opinion for the court, Justice Powell wrote that the university's interest in the program was reinforced by the special concern of the First Amendment for "academic freedom," which he defined as "the freedom of the university to make its own judgments as to education."⁸⁰ In *Regents of the University of Michigan v. Ewing*, a case that challenged a negative faculty evaluation of a medical student leading to his dismissal, Justice Stevens wrote that the Court showed judicial deference to the university's decision.⁸¹ In addition to noting "great respect for the faculty's judgment," Stevens said the Court's "reluctance to trench on the prerogatives of state and local educational institutions" fulfilled "its responsibility to safeguard their academic freedom."⁸² He added that "Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students... but also, and somewhat inconsistently, on autonomous decision-making by the academy itself."⁸³

Most recently, the Supreme Court denied certiorari to a case in which the Fourth Circuit ruled that academic freedom belongs to universities, not professors.⁸⁴ In *Urofsky v. Gilmore*,⁸⁵ the Fourth Circuit rejected a professor's contention that a Virginia law restricting public employees' access to sexually explicit materials on state computers violated his right of academic freedom. The court said:

In essence, Appellees contend that a university professor possesses a constitutional right to determine for himself, without the input of the university (and perhaps even contrary to the university's desires), the

⁷⁹438 U.S. 265 (1978).

⁸⁰*Id.* at 312 (Powell, J.).

⁸¹474 U.S. 214 (1985).

⁸²*Id.* at 225.

⁸³*Id.* at 226 n. 12 (citations omitted).

⁸⁴*Urofsky v. Gilmore*, 216 F.3d 401 (2000), *cert denied* 121 S. Ct. 759 (2001).

⁸⁵*Id.* at 409-10.

subjects of his research, writing, and teaching. . . . Our review of the law, however, leads us to conclude that to the extent the Constitution recognizes any right of "academic freedom" above and beyond the First Amendment rights to which every citizen is entitled, the right inheres in the University, not in individual professors, and is not violated by the terms of the Act.⁸⁶

Citing, *Sweezy*⁸⁷, *Keyishian*,⁸⁸ *Bakke*⁸⁹ and *Ewing*⁹⁰, the court added, "It is true, of course, that homage has been paid to the ideal of academic freedom in a number of Supreme Court opinions, often with reference to the First Amendment.... Despite these accolades, the Supreme Court has never set aside a state regulation on the basis that it infringed a First Amendment right to academic freedom."⁹¹

The Supreme Court's refusal to hear *Urofsky* does not mean that it has embraced the Fourth Circuit's reasoning. "It does suggest, however, that the Supreme Court feels no sense of urgency to defend the notion that professors at state colleges have greater First Amendment rights than other employees."⁹²

Although not an enumerated right, "academic freedom for individuals has been linked by the Court to the freedom of speech and assembly clauses of the First Amendment and to the due process clause of the Fourteenth Amendment. By contrast ...the court has not given academic freedom for institutions a specific constitutional

⁸⁶*Id.*

⁸⁷*Sweezy v. New Hampshire*, 354 U.S. 234, 250, 1 L. Ed. 2d 1311, 77 S. Ct. 1203 (1957) (plurality opinion); *Id.* at 261-63 (Frankfurter, J., concurring in the result).

⁸⁸*Keyishian v. Board of Regents*, 385 U.S. 589, 603, 17 L. Ed. 2d 629, 87 S. Ct. 675 (1967).

⁸⁹*Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312-13, 57 L. Ed. 2d 750, 98 S. Ct. 2733 (1978) (opinion of Powell, J.).

⁹⁰*Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 & n.12, 88 L. Ed. 2d 523, 106 S. Ct. 507 (1985).

⁹¹*Id.* at 411-12.

⁹²Gary Pavela, ASJA Law & Policy Report, No. 3 - February 7, 2001, (visited April 14, 2000) <<http://asja.tamu.edu>>.

rationale."⁹³ If academic freedom draws its strength from the First Amendment, it is constitutionally irrational to apply a right of academic freedom to public institutions. As one commentator points out, the claim that public entities like universities are protected by the First Amendment contains the corollary that the state as employer has constitutional rights enforceable against its creator, the prime state or government – "an idea that may appeal to legal sentimentalists but that is not an easy one for constitutional logicians to follow or swallow."⁹⁴

Nevertheless, pointing out a logical inconsistency in this line of cases does not alter their impact on professor's rights. For the time being, at least, the Supreme Court seems to be signaling that whatever support it grants for academic freedom belongs to institutions, rather than individuals. And, if this is the case, it is unlikely that it would support academic freedom as the legal hook upon which to base a teacher exception to the work-for-hire doctrine. This is unfortunate, because academic freedom is the natural justification for the teacher exception, and, in fact, frequently cited by academics⁹⁵ and universities⁹⁶ as the basis for exempting traditional faculty writings from university copyright claims.

⁹³Metzger, *supra* note 65, at 1318.

⁹⁴*Id.*

⁹⁵See Simon, *supra* note 19, at 502, n. 106 ("Many professors felt that 'academic freedom' included not only the right to pursue studies of one's choice, but to retain the fruits of those studies"); Laughlin, *supra* note 20, at 560 ("Traditionally, it was presumed that educators owned the copyright to academic work they have authored or created. Academic freedom is cited as a primary reason for such an arrangement."); and Eyal Press & Jennifer Washburn, *Digital Diplomas*, MOTHER JONES, January/February 2001, at 34, 38 (quoting a UCLA professor, saying that if universities laid claim to faculty intellectual property, "it would undermine the legal protection that enables faculty to freely express their views without fear of censorship or appropriation of their ideas").

⁹⁶See *infra* note 114-15 and accompanying text.

AN ANALYSIS OF UNIVERSITY COPYRIGHT POLICIES

Ironically, in lieu of specific legal protection for academic work, faculty are left to turn to their university copyright policies for copyright protection from their employers. In terms of copyright policy, what faculty have in their favor at this point is tradition.⁹⁷ Although universities have long claimed ownership over faculty inventions that are patentable, they have traditionally allowed faculty to retain ownership over copyrightable works, particularly scholarly writing.⁹⁸ There is no mystery in this. Patents are frequently profitable, while copyrighted scholarly articles are rarely so. What faculty wonder is whether universities will continue to observe the tradition in regard to digital work, which is potentially profitable. The answer to this question is reflected in the following results of a content analysis of university policies.

Ten years ago Laura Lape analyzed seventy institutions identified as Research Universities I by the Carnegie Foundation for the Advancement of Teaching to determine whether they had copyright policies and, if so, what was included in them.⁹⁹ Following are the results from a content analysis that repeats her study.¹⁰⁰ The intention of the

⁹⁷See Simon, *supra* note 19, at 496 ("Perhaps the major reason that universities have not claimed copyright is the longstanding custom that professors own the copyright to works created while they are employed at a college or university. Most faculty members do not even consider the question of copyright ownership when contracting with a school to teach, research and write.").

⁹⁸See Dreyfuss, *supra* note 3, at 591 ("[U]niversities traditionally have required faculty members in the sciences to assign to their employers the patent rights to their inventions") and Georgia Harper, *Developing a Comprehensive Copyright Policy to Facilitate Online Learning*, 27 J.C.U.L. 9 ("Five to ten years ago, university intellectual property policies likely were written without much thought about ownership and management of copyright works. Neither the inventions that were the chief concern of such policies nor the scholarly works that may or may not have been recognized as exceptions to the general rule of university ownership warranted any special understanding of copyright law.").

⁹⁹Lape, *supra* note 34 at 252 (1992).

¹⁰⁰This study is based on the original 70 universities used in Lape's study. These universities are listed in Appendix A of this article. The Carnegie Foundation has changed its classification system somewhat. It now classifies what were Research I institutions as Doctoral/Research Universities – Extensive. See <http://www.carnegiefoundation.org/classification/>. Under the new classification system and over the last ten years, the number of top-tier research institutions has grown from 70 to 152. To conform to Lape's

second analysis is to provide evidence of trends in academe regarding the rights of university professors to their intellectual and creative work, and also to show how those trends might have changed over the past decade.

Although the study is not representative of all universities, it shows that within the population studied, universities are moving toward greater comprehensiveness, regarding faculty copyrights. Lape's study, conducted between 1990-91, found that of the seventy universities included, eleven had not adopted a written copyright policy regarding ownership of faculty works and an additional five had policies in draft form only.¹⁰¹ Ten years later all but one has adopted a copyright policy and three are working on drafts.¹⁰² Lape also found that every policy she studied claimed at least some faculty works;¹⁰³ the updated study found the same.

Generally the reason given for claiming faculty work is substantial use of university resources; however, some universities claim works created with any universities resources not available for free to the general public. Lape did not distinguish between the two, but found that forty-two universities employed some variant of this language.¹⁰⁴ Fifty-seven do now.¹⁰⁵ Lape noted, and this is still the case, that universities

analysis, however, I have restricted the sample to the original 70 studied. Yeshiva University, however, refused to participate.

¹⁰¹Lape, *supra* note 34, at 252.

¹⁰²Telephone conversation with Dennis Hart, General Counsel, Boston University (Jan. 22, 2001)(indicating that Boston University does not have a copyright policy); MASSACHUSETTS INSTITUTE FOR TECHNOLOGY, DRAFT OF THE AD HOC FACULTY COMMITTEE ON INTELLECTUAL PROPERTY AND CONFLICT OF COMMITMENT (visited Jan. 27, 2001) <http://web.mit.edu/committees/ip> (noting that the university expects its draft to be approved by May 2001); NORTHWESTERN UNIVERSITY, INTELLECTUAL PROPERTY GUIDELINES (visited Jan. 24, 2001) <http://www.northwestern.edu/research/policies/> (indicating that Northwestern is still in the process of formulating its policy and has been for several years); UNIVERSITY OF SOUTHERN CALIFORNIA, INTELLECTUAL PROPERTY POLICY DRAFT (visited Jan. 30, 2001) <http://www.usc.edu/academe/acsen/issues/ipr/index.html> (indicating that USC expects its Academic Senate to consider its policy by May 2001).

¹⁰³Lape, *supra* note 34, at 253.

¹⁰⁴*Id.* at 257.

¹⁰⁵Thirty-five of the fifty-seven universities require significant or substantial use of resources. CARNEGIE-MELLON UNIVERSITY, INTELLECTUAL PROPERTY POLICY 3 (visited Jan. 23, 2001) http://policy.andrew.cmu.edu/univ_policy/documents/IntellProp.html; CASE WESTERN RESERVE UNIVERSITY, UNIVERSITY POLICY ON AUTHORSHIP AND COPYRIGHT 1 (visited Jan. 23, 2001) http://www.cwru.edu/affil/UTI/standard_docs/author.html; CORNELL UNIVERSITY, CORNELL UNIVERSITY COPYRIGHT POLICY 2 (visited Jan. 23, 2001) <http://www.research.cornell.edu/CRF/Policies/Copyright.html>; COLUMBIA UNIVERSITY, COLUMBIA UNIVERSITY COPYRIGHT POLICY 2 (visited Feb. 23, 2001) <<http://www.columbia.edu/cu/provost/docs/copyright.html>>; DUKE UNIVERSITY, DUKE UNIVERSITY POLICY ON INTELLECTUAL PROPERTY RIGHTS 1 (visited Jan. 23, 2001) <<http://www.provost.duke.edu/IntelProp.pdf>>; HARVARD UNIVERSITY, STATEMENT OF POLICY IN REGARD TO INVENTIONS, PATENTS AND COPYRIGHTS 4 (visited Jan. 23, 2001) <http://www.techtransfer.harvard.edu/PatentPolicy.html>; HOWARD UNIVERSITY, HOWARD UNIVERSITY INTELLECTUAL PROPERTY POLICY 3 (dated Sept. 23, 1993) (faxed from the Office of the General Counsel Feb. 2, 2001); Massachusetts Institute of Technology, *supra* note 102, at 1; NEW MEXICO STATE UNIVERSITY, POLICY AND PROCEDURES GOVERNING INTELLECTUAL PROPERTY 1 (visited Jan. 24, 2001) <http://www.nmsu.edu/~app/research/resear04.html>; NEW YORK UNIVERSITY, STATEMENT OF POLICY ON COPYRIGHTS 23 (visited Jan. 24, 2001) <http://www.nyu.edu/academic/appointments/policies.html#copyright>; NORTH CAROLINA STATE UNIVERSITY, PATENT AND COPYRIGHT POLICIES AND PROCEDURES OF NORTH CAROLINA STATE UNIVERSITY 1 (visited Jan. 24, 2001) http://www2.ncsu.edu/ncsu/research_outreach_extension/policy/patent.html; OHIO STATE UNIVERSITY, POLICY ON PATENTS AND COPYRIGHTS 3 (visited Jan. 24, 2001) <http://www.techtransfer.rf.ohio-state.edu/OTTPolicy.html>; PRINCETON UNIVERSITY, COPYRIGHT POLICY 2 (visited Jan. 24, 2001) <http://www.princeton.edu:80/~patents/policies/copypol.html>; RUTGERS UNIVERSITY, INTERIM COPYRIGHT POLICY 1 (visited Jan. 24, 2001) <http://info.rutgers.edu/Services/Corporate/copyrigh.html>; STANFORD UNIVERSITY, COPYRIGHT POLICY 2 (visited Jan. 24, 2001) <http://www.stanford.edu/dept/DoR/rph/5-2.html>; TEXAS A&M UNIVERSITY, MANAGEMENT OF INTELLECTUAL PROPERTY 5 (visited Jan. 24, 2001) <http://sago.tamu.edu/policy/17-02-01.htm>; UNIVERSITY OF CINCINNATI, OVERVIEW OF PROTECTING INTELLECTUAL PROPERTY 1 (visited Jan. 24, 2001) <http://www.ipo.uc.edu/policies/results.cfm?id=2>; UNIVERSITY OF CONNECTICUT, INVENTION & PATENT OWNERSHIP 6 (visited Jan. 27, 2001) <http://www.osp.uconn.edu/ownership.html>; UNIVERSITY OF FLORIDA, INTELLECTUAL PROPERTY POLICY 22 (visited Jan. 24, 2001) <http://web.otl.ufl.edu/otl/patents.html>; UNIVERSITY OF GEORGIA, RESEARCH POLICIES & PROCEDURES HANDBOOK: INTELLECTUAL PROPERTY POLICY OF THE UNIVERSITY OF GEORGIA 3 (visited Jan. 24, 2001) http://www.ovpr.uga.edu/rp/rph_chp2.html#Ownership%20of%20Intellectual; UNIVERSITY OF ILLINOIS SYSTEM, POLICY ON PATENTS AND COPYRIGHTS 4 (visited Jan. 24, 2001) <http://www.vpaa.uillinois.edu/policies/patents.htm>; UNIVERSITY OF IOWA, ADMINISTRATIVE, FINANCIAL AND FACILITIES POLICIES: INTELLECTUAL PROPERTY 1 (visited Jan. 24, 2001) <http://www.uiowa.edu/~our/opmanual/v/31.htm>; UNIVERSITY OF KENTUCKY, INTELLECTUAL PROPERTY DISPOSITION AND ADMINISTRATIVE REGULATION 3 (visited Jan. 24, 2001) [gopher://ukcc.uky.edu:70/0text%20uka079%21191/ar034.txt](http://ukcc.uky.edu:70/0text%20uka079%21191/ar034.txt); UNIVERSITY OF MISSOURI, COPYRIGHT REGULATIONS 1 (visited Jan. 24, 2001) <http://www.system.missouri.edu:80/uminfo/rules/business-mgmt/100030.htm>; UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, REVISION OF BOARD OF GOVERNORS' PATENT AND COPYRIGHT POLICIES 1 (visited Jan. 24, 2001) <http://research.unc.edu/otd/policies/revise.html>; UNIVERSITY OF PENNSYLVANIA, V.E. COPYRIGHT POLICY 1 (visited Jan. 27, 2001) http://www.upenn.edu/assoc-provost/handbook/v_e.html; UNIVERSITY OF ROCHESTER, POLICY ON INTELLECTUAL PROPERTY AND TECHNOLOGY TRANSFER 3 (visited Jan. 24, 2001)

<http://www.rochester.edu:80/ORPA/tto/patpol97.htm> ; University of Southern California, *supra* note 102, at 4; UNIVERSITY OF TENNESSEE AT KNOXVILLE, STATEMENT OF POLICY ON PATENTS, COPYRIGHTS, AND LICENSING 2 (faxed from the Office of the General Counsel Jan. 30, 2001); UNIVERSITY OF UTAH, COPYRIGHT POLICY: OWNERSHIP 3 (visited Jan. 24, 2001) <http://www.admin.utah.edu/ppmanual/6/6-7.html>; UNIVERSITY OF VIRGINIA, COPYRIGHT POLICY 2 (visited Jan. 24, 2001) <http://www.virginia.edu/~polproc/pol/xvel.html>; UNIVERSITY OF WASHINGTON, UW COPYRIGHT POLICY 3 (visited Jan. 27, 2001) <http://depts.washington.edu/uwcopy/information/uwpolicies/1.shtml>; UNIVERSITY OF WISCONSIN, FINANCIAL AND ADMINISTRATIVE POLICIES: COPYRIGHTABLE INSTRUCTION MATERIALS OWNERSHIP, USE AND CONTROL 1 (visited Jan. 27, 2001) <http://www.uwsa.edu/fadmin/gapp/gapp27.htm>; WASHINGTON UNIVERSITY, INTELLECTUAL PROPERTY POLICY 2 (visited Jan. 27, 2001) <http://www.wustl.edu/faculty/wufacultybook.html#appendix%20k>; YALE UNIVERSITY, YALE UNIVERSITY COPYRIGHT POLICY 2 (visited Jan. 24, 2001) <http://www.cis.yale.edu/grants/copyright.html>.

Twenty-two of the fifty-seven universities require only a use of university resources or facilities. CALIFORNIA INSTITUTE OF TECHNOLOGY, COPYRIGHT AND SOFTWARE POLICY 1 (visited Jan. 24, 2001) http://www.search.caltech.edu/departamental_directory/General_Counsel_Office.html; COLORADO STATE UNIVERSITY, RIGHTS AND RESPONSIBILITIES RELATED TO CREATIVE WORKS 2 (visited Jan. 23, 2001) <http://www.colostate.edu/orgs/FacultyCouncil/sectionj.htm>; GEORGIA INSTITUTE OF TECHNOLOGY, GEORGIA TECH INTELLECTUAL PROPERTY POLICY 3 (visited Jan. 23, 2001) <http://www.academic.gatech.edu/handbook/Section6/Intellectual.html>; INDIANA UNIVERSITY, INTELLECTUAL PROPERTY POLICY 2 (visited Jan. 23, 2001) <http://www.indiana.edu/~rugs/respol/intprop.html>; JOHNS HOPKINS UNIVERSITY, THE JOHNS HOPKINS UNIVERSITY INTELLECTUAL PROPERTY POLICY 3 (visited Jan. 23, 2001) http://infonet.welch.jhu.edu/policy/intellectual_prop_guide/som_intpolA.html; LOUISIANA STATE UNIVERSITY, INTELLECTUAL PROPERTY 2 (visited Jan. 23, 2001) http://www.lsu.edu/intellectual_property/html/docs/frampol.html; MICHIGAN STATE UNIVERSITY, FACULTY AND UNIVERSITY RIGHTS IN UNIVERSITY-SPONSORED INSTRUCTIONAL MATERIALS 2 (visited Jan. 24, 2001) <http://www.msu.edu/unit/facrecds/FacHand/developinstruct.html>; OREGON STATE UNIVERSITY, POLICIES RELATING TO INVENTIONS, LICENSE AGREEMENTS, EDUCATIONAL AND PROFESSIONAL MATERIALS DEVELOPMENT, PATENTS AND COPYRIGHTS 2 (visited Jan. 30, 2001) http://arcweb.sos.state.or.us/rules/OARS_500/OAR_580/580_043.html; PURDUE UNIVERSITY, STATEMENT OF UNIVERSITY POLICY, PRINCIPLES AND ADMINISTRATIVE PROCEDURES RELATING TO THE OWNERSHIP OF PATENTS, COPYRIGHTS, AND OTHER RIGHTS IN INVENTIONS AND IN WRITTEN AND RECORDED MATERIALS 2 (visited Jan. 24, 2001) <http://www.adpc.purdue.edu/VPBS/b-10.htm>; THE ROCKEFELLER UNIVERSITY, COPYRIGHT POLICY 1 (last modified Oct. 27, 2000) www.rockefeller.edu/techtransfer/copyright1.pdf; STATE UNIVERSITY OF NEW YORK AT STONY BROOK, SUNY COPYRIGHT POLICY 1 (last updated Oct. 11, 2000) (faxed from the General Counsel's Office Jan. 30, 2001); UNIVERSITY OF ARIZONA, THE UNIVERSITY OF ARIZONA INTELLECTUAL PROPERTY POLICY 5 (visited Jan. 24, 2001) <http://www.ott.arizona.edu/intelproppolicies.htm>; UNIVERSITY OF CALIFORNIA SYSTEM, POLICY ON COPYRIGHT OWNERSHIP 4 (visited Jan. 24, 2001) <http://www.ucop.edu/ucophome/uwnews/copyr.html>; UNIVERSITY OF CHICAGO, ACADEMIC POLICIES: NEW INFORMATION TECHNOLOGY AND INTELLECTUAL PROPERTY AT THE UNIVERSITY 54 (visited March 10, 2001) <http://www.uchicago.edu/uchi/policies.html>; UNIVERSITY OF COLORADO AT BOULDER, TECHNOLOGY TRANSFER AND INDUSTRY OUTREACH: POLICY ON INTELLECTUAL PROPERTY 1 (visited Jan. 24, 2001) <http://www.colorado.edu/TechnologyTransfer/Policy.html>; UNIVERSITY OF MARYLAND, POLICY ON

often cite use of university resources as an equitable basis for their claims to faculty work.¹⁰⁶ Lape found that sixteen universities narrowed the scope of works claimed under this standard by excluding from "substantial use of resources" commonly used resources such as libraries, offices, salaries, classrooms, laboratories and secretaries.¹⁰⁷ That number is now twenty.¹⁰⁸ She also noted that two policies attempted to define "substantial resources" in terms of dollar amounts.¹⁰⁹ Only one university does that now.¹¹⁰

Most policies attempt to protect some faculty interests in retaining the copyright to traditional literary works, such as books, articles, plays and poetry. Lape found that sixteen policies expressly disclaimed traditional scholarly works, although most included

COPYRIGHTS 1 (visited Jan. 27, 2001)

<http://www.usmd.edu/Leadership/BoardOfRegents/Bylaws/SectionIV/IV310.html>; UNIVERSITY OF MIAMI,

SPONSORED PROGRAMS POLICIES AND PROCEDURES: INTELLECTUAL PROPERTY – PATENTS, COPYRIGHTS & INVENTIONS 1 (visited Jan. 24, 2001) <http://www.controller.miami.edu/gifs/c7.htm>; UNIVERSITY OF

MINNESOTA, BOARD OF REGENTS POLICY: INTELLECTUAL PROPERTY 2 (visited Jan. 24, 2001)

<http://www.inform.umd.edu/copyown/policies/index.html>; UNIVERSITY OF NEW MEXICO, BOARD OF

REGENTS POLICY MANUAL: INTELLECTUAL PROPERTY 4 (visited Jan. 27, 2001)

<http://www.unm.edu/~brpm/r58.htm>; UNIVERSITY OF PITTSBURGH, COPYRIGHTS 2 (visited Jan. 24, 2001)

<http://www.pitt.edu/HOME/PP/policies/11/11-02-02.html>; VANDERBILT UNIVERSITY, POLICY ON

TECHNOLOGY AND LITERARY AND ARTISTIC WORKS 2 (visited Jan. 27, 2001)

http://www.vanderbilt.edu/technology_transfer/policy.htm; VIRGINIA POLYTECHNIC INSTITUTE AND STATE

UNIVERSITY, POLICY ON INTELLECTUAL PROPERTIES 4 (visited Jan. 24, 2001)

<http://www.vt.edu/admin/policies/13000/13000.html>.

¹⁰⁶Lape, *supra* note 34, at 257.

¹⁰⁷*Id.*

¹⁰⁸E.g., Columbia University, *supra* note 105, at 3 ("Ordinary use of resources such as the libraries, one's office, desktop computer and University computer infrastructure, secretarial staff and supplies, is not considered to be substantial use of such resources for purposes of vesting the University with copyright ownership in a work."); Harvard University, *supra* note 105, at 5 ("The University does not regard the provision of academic year salary, office, usual library resources, usual facilities and office staff, or personal computers as constituting 'substantial University financial, staff, or other assistance' or 'special or rare University...holdings' unless such resources were made available specifically to support the development of certain materials to be acquired by the University."); and New York University, *supra* note 105, at 23 ("[N]one of the following shall be considered substantial use; use of resources or personnel commonly available to all faculty, such as libraries, offices, or secretarial staff; use of a specialize facility for routine tasks; or payment of faculty salary from instructional accounts.").

¹⁰⁹Lape, *supra* note 34, at 257-58.

exceptions to the disclaimer.¹¹¹ This number has increased substantially. Now forty-nine universities disclaim traditional scholarly work, although most still include exceptions.¹¹² A number of policies also include provisions that cede control of educational materials, including syllabi, lecture notes, tests and, in some cases, materials posted on the Web, to the professors who create them. Although Lape did not break this number out in her analysis, twelve universities include such policies, many of which also come with exceptions.¹¹³

¹¹⁰Carnegie-Mellon, *supra* note 105, at 3 ("Use will be considered 'extensive' and facilities will be considered 'major' if similar use of similar facilities would cost the creator more than \$5,000 ... in constant 1984 dollars if purchased or leased in the public market.").

¹¹¹Lape, *supra* note 34, at 262.

¹¹²E.g., California Institute of Technology, *supra* note 105, at 1 ("Copyrights to and royalties from textbooks, reference works, submissions to scientific journals, and other copyrightable materials (except for computer software...) produced by Faculty members as a part of their normal teaching and scholarly activities at the Institute and that do not result from projects specifically funded in whole or in part by the Institute or by a sponsor of the Institute, shall belong to the author..."); Colorado State University, *supra* note 105, at 2 ("In the interest of encouraging the development of new and scholarly material and the publication of such works, the University will continue the tradition of not claiming ownership or a share of the proceeds from scholarly works such as Academic Materials, textbooks or their equivalent not supported through the use of University Resources...or expressly commissioned by the University."); University of Kentucky, *supra* note 105, at 3 ("Traditional products of scholarly activity which have customarily been considered to be the unrestricted property of the author or originator are excepted from the general policy. Such traditional products include journal articles, textbooks, reviews, works of art..., and course materials....The University has not and will not claim any ownership rights to such traditional works and also specifically disclaims any potential rights to do so under the 'work for hire' provisions of the U.S. Copyright Act"). Other exemptions give all employee and student authors protection for traditional works. E.g., Cornell, *supra* note 105, at 3 ("Copyrightable Traditional Works such as books, manuscripts, artistic works, movies, and television programs, historically have been the property of the Author. It is not the intent of this Policy to change significantly the relationship between the Author and the University that has existed through the years". However, the university claims "encoded works", which include software and other technologies "used for electronic capture"); and University of Cincinnati, *supra* note 105, at 3 ("Under the University...policy, 'literary works' include books, lecture notes, laboratory manuals, artifacts, visual art and music....Ownership of and intellectual property rights to 'literary works' produced by those connected with the University are vested in the individuals involved". The policy specifically excludes computer and audio visual works, however.).

¹¹³Some policies regarding educational materials are fairly straightforward. E.g., Carnegie-Mellon, *supra* note 105, at 5 (claiming software but allowing faculty to keep educational courseware "because of its role in furthering the primary educational mission of the university"); University of Indiana, *supra* note 105, at 2 (disclaiming "instructional materials"); and Johns Hopkins University, *supra* note 105, at 3 (disclaiming copyright in "scholarly works in tangible or electronic form," including "textbooks and other curricular

Attendant with the increase in exceptions for traditional faculty work products is an increase in the number of references to academic freedom or some similar language. Lape found that eighteen policies contained statements of commitment to academic freedom or the free dissemination of ideas.¹¹⁴ This number is now twenty-nine.¹¹⁵ However a few universities used academic freedom as an excuse to copyright or patent faculty work.¹¹⁶

The data show that universities are consistent in their interest in software, but are not necessarily incorporating more provisions asserting ownership over it. The study did not address the question of whether these provisions are more actively pursued, however. Lape found that nineteen policies distinguished computer programs from other copyrightable works.¹¹⁷ This is still the case, although the schools are not necessarily the same.¹¹⁸ Lape's study did not include policies that listed computer programs in a "laundry

materials"). Others include significant loopholes. *E.g.*, Michigan State University, *supra* note 105, at 2 (disclaiming tests, syllabi and workbooks as long as their preparation was not assisted by the university in any material way. Later, the policy clarifies that material assistance refers to the use of any university equipment, material or service); and Stanford University, *supra* note 105, at 3 (claiming no ownership over "pedagogical works," but later claiming to own courses and courseware).

¹¹⁴Lape, *supra* note 34, at 262.

¹¹⁵*E.g.*, Columbia University, *supra* note 105, at 1 (citing the 1940 Statement of Principles on Academic Freedom and Tenure of the American Association of University Professors); University of Chicago, *supra* note 105, at 52 ("Neither new information technologies nor rules and procedures designed to accommodate them should interfere in any way with the ability of faculty members to pursue their research and freely present their ideas to their colleagues, their students, and the world at large); University of Tennessee, *supra* note 105, at 2 ("The University of Tennessee recognizes and reaffirms the traditional academic freedom of its faculty to engage in scholarly activity and to publish freely without restriction"); and Vanderbilt University, *supra* note 105, at 1 ("This policy is intended to be consistent with the University's commitment to academic freedom").

¹¹⁶*E.g.*, New York University, *supra* note 105, at 23 ("From time to time there arise cases where ownership by faculty members of copyright in computer software may not be consistent with certain of the University's basic commitments, such as protecting academic freedom...") and Oregon State University, *supra* note 105, at 2 (citing its Board's intent to protect "academic freedom of employees in the publication of materials, development of inventions and discovery of technological improvements," but the policy claims ownership of all faculty work").

¹¹⁷Lape, *supra* note 34, at 254.

¹¹⁸Schools that currently distinguish computer programs from other copyrightable works include: California Institute of Technology, *supra* note 105, at 1; Carnegie-Mellon University, *supra* note 105, at 5, Colorado

list" of other works claimed, however.¹¹⁹ So there is no way of knowing how many universities considered software as one among many potential targets of university ownership ten years ago. Today at least thirty-four universities have incorporated software into their policies as a possible work falling within university purview.¹²⁰ Lape found that five universities had separate policies dealing with software specifically.¹²¹ This is also the case now; although, again, they are not necessarily the same five.¹²² Some universities also treat ownership of computer programs in their patent policies, even if they are protected by copyright instead of patent law. Lape found four universities doing this; two do it now.¹²³

With the exception of policies that claim works by genre, the remaining standards for claiming faculty work fall under the work-for-hire concept. Lape found that twenty-five policies claimed works produced as a result of "specific," "direct," or "written" "job

State University, *supra* note 105, at 3; Cornell University, *supra* note 105, at 1 (claiming "encoded works"); Duke University, *supra* note 105, at 1; Howard University, *supra* note 105, at 10; Indiana University, *supra* note 105, at 3 (claiming "device-like software"); Johns Hopkins University, *supra* note 105, at 3; Louisiana State University, *supra* note 105, at 2; Massachusetts Institute of Technology, *supra* note 102, at 2; Ohio State University, *supra* note 105, at 1; The Rockefeller University, *supra* note 105, at 1; University of Chicago, *supra* note 105, at 52 (claiming "new information technologies"); University of Connecticut, *supra* note 105, at 6; University of Michigan, *supra* note 105, at 6, n. 1; University of New Mexico, *supra* note 105, at 4; University of Pittsburgh, *supra* note 105, at 2; Vanderbilt University, *supra* note 105, at 2; and Virginia Polytechnic, *supra* note 105, at 4-5.

¹¹⁹Lape, *supra* note 34, at 255, n. 130.

¹²⁰*E.g.*, University of Cincinnati, *supra* note 105, at 3 ("[S]pecifically excluded from this list [of faculty-owned works] are audiovisual and computer materials including audio and video tapes, slides and photographs, films, computer programs and computer-stored information").

¹²¹Lape, *supra* note 34, at 255, n. 130.

¹²²NEW YORK UNIVERSITY, STATEMENTS OF POLICY ON COMPUTER SOFTWARE COPYRIGHTS 22 (visited Jan. 24, 2001) <http://www.nyu.edu/academic/appointments/policies.html#copyright>; NORTH CAROLINA STATE UNIVERSITY, OWNERSHIP OF COMPUTER SOFTWARE 1 (visited Jan. 24, 2001) http://www2.ncsu.edu/research_outreach_extension/policy/computer.html; SOUTHERN UNIVERSITY OF NEW YORK, SUNY COMPUTER SOFTWARE POLICY 1 (updated Dec. 4, 2000) (faxed from the General Counsel's Office Jan. 30, 2001); UNIVERSITY OF COLORADO, SOFTWARE AS INTELLECTUAL PROPERTY 1 (visited Jan. 24, 2001) <http://www.Colorado.EDU/TechnologyTransfer/Software.html>; and UNIVERSITY OF PENNSYLVANIA, V.G. POLICY ON COMPUTER SOFTWARE 1 (visited Jan. 27, 2001) http://www.upenn.edu/assoc-provost/handbook/v_g.html.

¹²³Case Western University, *supra* note 105, at 1 and Princeton University, *supra* note 105, at 2.

assignment" or "duties."¹²⁴ This number has increased to thirty-seven.¹²⁵ Lape found that nine policies claimed works produced by "persons hired to produce such works."¹²⁶ Twelve policies now include this terminology.¹²⁷ Ten policies claimed "commissioned works" in Lape's study.¹²⁸ Twenty-three policies do now.¹²⁹ Six policies in Lape's study claimed works made for hire within the meaning of the Copyright Act.¹³⁰ Now, eighteen policies make that statement or one claiming work developed within the scope of employment.¹³¹ Frequently, though, the university conception of a work for hire varies

¹²⁴Lape, *supra* note 34, at 259.

¹²⁵E.g., Georgia Institute of Technology, *supra* note 105, at 3 (claiming "institution-assigned efforts," noting "the general obligation to produce scholarly and creative works does not constitute a specific assignment for this purpose"); Indiana University, *supra* note 105, at 2 (claiming works "created at the instigation of the University, under the specific direction of the University, for the University's use, by a person acting within the scope of his or her employment or subject to a written contract"); University of Miami, *supra* note 105, at 2 (claiming works "developed as a direct result of the regular duties of the faculty or staff member, or developed by a faculty or staff member as a result of research done on, or in connection with, a thesis or dissertation or problem pertaining thereto; or as a result of a program of research financed wholly or in part by university funds..."); and University of Wisconsin, *supra* note 105, at 2 (claiming works that are "produced as an assigned duty of employment").

¹²⁶Lape, *supra* note 34, at 259.

¹²⁷E.g., Purdue University, *supra* note 105, at 2 (claiming works "developed in the course of employment" by individuals "employed by the University for the specific purpose of preparing or producing the Materials" following a written agreement signed by both parties); Texas A&M University, *supra* note 105, at 4-5 (claiming works "created for institutional purposes in the course of the creators' employment, including but not limited to simultaneous or sequential contributions over time by numerous faculty, staff or students" and works "which staff members are hired to develop"); and University of Texas, *supra* note 105, at 2 (claiming "intellectual property created by an employee who was hired specifically or required to produce it").

¹²⁸Lape, *supra* note 34, at 259.

¹²⁹E.g., University of Minnesota, *supra* note 105, at 1 (claiming works "agreed in writing to be a specially commissioned work") and UNIVERSITY OF NORTH CAROLINA, UNIVERSITY COPYRIGHT GUIDELINES 2 (visited Jan. 24, 2001) <http://research.unc.edu/otd/policies/memcpyg.html> ("The University shall own the copyright to any work that is specially ordered or commissioned by the University if the faculty or staff member and the University expressly agree in a written agreement signed by them that the copyright to the work shall belong to the University").

¹³⁰Lape, *supra* note 34, at 259.

¹³¹E.g., Howard University, *supra* note 105, at 3 ("Works for hire" shall be considered the property of the University. Works for hire are defined in the Copyright Act of 1976, as amended, and generally arise in the following situations: i) The author is an employee of the University and the creation of the copyrightable work is within the scope of the author's employment. ii) The University specifically commissions a work from a faculty or staff member. Agreements for such works should generally be in writing"); Stanford

somewhat from the statute's conception. Many university policies consider works for hire to be extra work assigned to a faculty member in addition to the professor's normal academic responsibilities.¹³² Other universities that claim works for hire from faculty stipulate that work-for-hire agreements be signed before the work begins, giving faculty advance notice that the university intends to claim the eventual product.¹³³

Some policies provide for joint ownership or a royalty-free license for the university to use faculty work, rather than sole ownership. Lape found that eighteen policies claimed to be "joint owners" or "co-authors" of some faculty works.¹³⁴ Only five make such a claim now, possibly reflecting the complications of joint ownership.¹³⁵

University, *supra* note 105, at 2 ("It is the policy of the University that all rights in copyright shall remain with the creator unless the work is a work-for-hire (and copyright vests in the University under copyright law", and at 9 "'Work for hire' is a legal term defined in the Copyright Act as 'a work prepared by an employee within the scope of his or her employment'"); and University of Arizona, *supra* note 105, at 3 ("Intellectual property developed by University employees in the course and scope of their employment is presumed to belong to the Board unless provided otherwise by this policy").

¹³²E.g., University of Georgia, *supra* note 105, at 3 ("Copyrightable works created by an employee in the course of his/her employment are considered to be works made for hire under the Copyright Law, with ownership vested in the employer. Notwithstanding the above, however, a faculty member's or student's general obligation to produce scholarly and creative works does not constitute a work for hire or specific University assignment").

¹³³E.g., University of Minnesota, *supra* note 105, at 3 (stating that disclaimers of regular academic work products do not apply to "a regular academic work product that is assigned in writing to the University or specifically ordered or commissioned and designated in writing by the creator and University as a specially commissioned work") and North Carolina State University, *supra* note 122, at 1 ("[A] computer program which is protected by copyright is presumed to be owned by its author unless it...is a Work for Hire (i.e., prepared by an employee as part of that employee's duties, consistent with a written statement given to the employee indicating that software development by the employee is to be considered a Work for Hire)").

¹³⁴Lape, *supra* note 34, at 260.

¹³⁵Universities that claim joint ownership over works produced with significant university resources include: Georgia Institute of Technology, *supra* note 105, at 3; North Carolina State University, *supra* note 122, at 1; Rutgers University, *supra* note 105, at 1; University of Georgia, *supra* note 105, at 3 and University of North Carolina, *supra* note 129, at 1. See also Lape, *supra* note 34, at 261 (noting that such joint ownership agreements may be undesirable because "both parties can license the work and joint decisions by the university and professor will be necessary for effective marketing of a work").

Meanwhile, in Lape's study, ten policies claimed non-exclusive, royalty-free licenses for the university's use of faculty work.¹³⁶ This number is now sixteen.¹³⁷

More commonly though, universities claim ownership of some faculty works and offer to share a percentage of royalties with the professor. Lape found that forty-six universities offered faculty creators a share of the income from at least some works claimed by the university.¹³⁸ Now, fifty universities offer such an arrangement.¹³⁹ This is usually not the case, however, when copyrightable works are classified as works made for hire.

Some universities also allow faculty to maintain some creative control over works claimed by the university. For example, some policies include provisions allowing professors to control dissemination and revision of their works and to determine whether and how long they are identified as a work's creator. Lape found that five policies included provisions allowing professors to control the use of a work within the university;¹⁴⁰ seven do now.¹⁴¹ Another seven policies allowed professors to revise their

¹³⁶Lape, *supra* note 34, at 261.

¹³⁷E.g., Colorado State University, *supra* note 105, at 8 (claiming an exclusive license to use works created with university resources in teaching and research); Howard University, *supra* note 105, at 5 (claiming a right to use at no cost to the university and for educational purposes only all intellectual property created by faculty working at the university used in teaching and employment activities); Texas A&M University, *supra* note 105, at 4 (claiming a royalty-free license to use teaching or course materials); and University of Southern California, *supra* note 102, at 5-6 (claiming not only a royalty license for all teaching materials, but a right to sell them).

¹³⁸Lape, *supra* note 34, at 262.

¹³⁹Most universities that offer faculty a share of the royalties from sale or licensing of their work do so on a graduated basis. E.g., Georgia Institute of Technology, *supra* note 105, at 4 (offering creator 30% of the first \$100,000, 25% of \$101,000-\$500,000, 20% of \$501,000-\$1 million, and 10% of any profits over \$1 million).

¹⁴⁰Lape, *supra* note 34, at 262.

¹⁴¹Case Western University, *supra* note 105, at 2; Michigan State University, *supra* note 105, at 4; Purdue University, *supra* note 105, at 3; University of Cincinnati, *supra* note 105, at 2; University of Missouri, *supra* note 105, at 3; and University of Washington, *supra* note 105, at 7. University of Utah, *supra* note 105, at 5 (stating it "will consult" the author on internal use).

works in Lape's study;¹⁴² ten do now.¹⁴³ Only one policy entitled professors to make new works based on the claimed work in Lape's study.¹⁴⁴ Today, six policies grant authors the right to continue using their work generally for nonprofit, academic purposes; two specifically refer to the right to make derivative works.¹⁴⁵ Lape found that none of the policies gave professors unilateral control over any aspect of the use of a work licensed for use outside the university, such as how or where the work was marketed or published.¹⁴⁶ This is still the case. However, Lape found that six policies provided for a transfer of copyright ownership back to the professor if commercialization or publication did not take place within a set period of time.¹⁴⁷ Sixteen policies contain such a stipulation now.¹⁴⁸ However, few of the policies are mandatory, and many include clauses that allow the universities to retain licensing rights or rights to derivative works.¹⁴⁹

¹⁴²Lape, *supra* note 34, at 263.

¹⁴³E.g., Harvard University, *supra* note 105, at 2 ("With respect to works in which the University takes ownership or has any form of control, the person(s) who created the intellectual property shall be consulted in the determination of how it is to be made public, developed, modified, and/or commercialized"); University of Washington, *supra* note 105, at 7 ("As long as the author or producer of such materials remains an employee of the University, the author may...request reasonable revisions of the materials prior to any instance of internal use"); and University of Wisconsin, *supra* note 105, at 4 ("Copyrightable instructional materials shall not be altered or revised without consultation with the author").

¹⁴⁴Lape, *supra* note 34, at 263.

¹⁴⁵Four policies allow professors to keep using works of theirs that have been claimed by their universities: Cornell University, *supra* note 105, at 3; Columbia University, *supra* note 105, at 2; New York University, *supra* note 105, at 24; and University of Missouri, *supra* note 105, at 3. Two policies specifically give professors the right to make derivative works from their originals that have been claimed by the university: Colorado State University, *supra* note 105, at 3 and Indiana University, *supra* note 105, at 4.

¹⁴⁶Lape, *supra* note 34, at 263.

¹⁴⁷*Id.*

¹⁴⁸E.g., Georgia Institute of Technology, *supra* note 105, at 4 (stating that if the university decides not to market the intellectual property, it must return the work within 30 days of its decision); Michigan State University, *supra* note 105, at 5 (stating that if use of the materials is discontinued for more than two years, the university must relinquish all rights to them to the faculty member who created them if he or she wants them); and Ohio State University, *supra* note 105, at 9 (stating that if the university does not arrange for commercial development of a work within a reasonable time, the creator may request that the university transfer the rights back to him or her).

¹⁴⁹E.g., University of Florida, *supra* note 105, at 15 (stipulating that at any stage in the commercialization of a work, the university may elect to withdraw its involvement. In such a case, the creator may request that

Lape predicted that as disputes arise regarding rights to faculty work, policies for interpretation and adjudication would become more important.¹⁵⁰ She noted that many policies provided for a committee within the university to perform the initial decision making regarding ownership of a faculty work, with a final "binding" decision to be made either through arbitration or by a university official, such as the provost or president.¹⁵¹ The original study did not mention how many policies included such provisions. Thirty-three do now.¹⁵² Three allow for binding arbitration; the rest rely on a member of the administration to settle disputes.¹⁵³ None of the policies seems to recognize an appearance of unfairness that might result from allowing a university official to be the final decision maker in a conflict between the faculty and university over ownership of faculty works.

The existence of an agreement, signed by both the professor and the university, that expressly incorporates the copyright policy may determine the policy's effectiveness in varying copyright ownership.¹⁵⁴ Lape found that six policies mentioned such an

ownership rights be transferred back to him or her, but the university will retain a royalty-free right to use the work); University of Michigan, *supra* note 105, at 2-3 (stating that if the university decides not to protect or license an intellectual work, it may transfer the rights back to the creator. But the return must be accompanied by recovery of any patenting or licensing fees, plus 15% of royalties, equity or other value received by the creator); and University of Southern California, *supra* note 102, at 15 (stating that the university may transfer the right to a work back to the creator of the work but retains the rights to all future derivatives of the work).

¹⁵⁰Lape, *supra* note 34, at 264.

¹⁵¹*Id.*

¹⁵²E.g., University of Indiana, *supra* note 105, at 10 ("The Creator of intellectual property and the Director of the Technology Transfer Office may appeal any adverse determination concerning the identification, protection, and/or management of such intellectual property to the University Research Policy Committee, whose determinations may be appealed to the Vice President for Research and the Dean of the Graduate School") and University of Hawaii, *supra* note 105, at 3-2 ("Any person aggrieved by the decision of the patent and copyright committee, may appeal to the president of the university. The decision by the president shall be final within the university administrative framework").

¹⁵³Carnegie-Mellon University, *supra* note 105, at 8; Duke University, *supra* note 105, at 5; and University of Washington, *supra* note 105, at 6.

¹⁵⁴Lape, *supra* note 34, at 255-56.

agreement.¹⁵⁵ Currently, eight mention a copyright agreement that employees must sign as a condition of employment.¹⁵⁶ However, none of the policies mentions the requirement of a signature from a university representative.

Lape noted that many of the policies made some provision for construction and enforcement of the policies' terms, but she did not say how many. This study found that eight policies included provisions for enforcement, suggesting measures that might be taken against employees who failed to volunteer information about their works, or attempted to license the works themselves.¹⁵⁷

Lape also noted that a number of policies were confusing, including undefined terms or unnecessarily vague language, as well as internal inconsistencies. This is still the case.¹⁵⁸

¹⁵⁵*Id.* at 256.

¹⁵⁶California Institute of Technology, *supra* note 105, at 1; Georgia Technological Institute, *supra* note 105, at 3; Howard University, *supra* note 105, at 10; New Mexico State University, *supra* note 105, at 2; Stanford University, *supra* note 105, at 3; University of Florida, *supra* note 105, at 7 (includes a sample at 33); University of Georgia, *supra* note 105, at 3; and University of Minnesota, *supra* note 105, at 5.

¹⁵⁷Some policies mention that state law requires employees to disclose intellectual property they have developed, *e.g.*, University of Connecticut, *supra* note 105, at 1; University of Florida, *supra* note 105, at 22; and University of Illinois, *supra* note 105, at 5. Others threaten legal or disciplinary action, *e.g.*, University of Minnesota, *supra* note 105, at 5; University of New Mexico, *supra* note 105, at 4; and University of Southern California, *supra* note 102, at 15. Others say that failure to disclose will disqualify the creator from a share of licensing revenue, *e.g.*, Virginia Polytechnic, *supra* note 105, at 6 and University of Rochester, *supra* note 105, at 2.

¹⁵⁸*E.g.*, UNIVERSITY OF CINCINNATI, COPYRIGHT AT THE UNIVERSITY OF CINCINNATI 3 (visited Jan. 24, 2001) <http://www.ipo.uc.edu/ipoverview/copy.cfm> (classing videotapes, slides, photographs, films, and computer programs as "inventions" rather than "literary works" and stating that "if there is a proposal to protect or license the 'invention,' then the rights to that invention, including copyright, are assigned to the University"); University of Colorado, *supra* note 105, at 1 (disclaiming rights to textbooks by faculty, but failing to address any other academic product in its copyright policy); University of Miami, *supra* note 105 at 2-3, 6 (treating intellectual property and copyright differently, as though intellectual property only encompassed patents. This probably comes from retrofitting a policy that was formerly for patents only by adding the word "authors" in with passages that were originally meant for inventors only.); University of Michigan, *supra* note 105, at 1-6 (focusing exclusively on the process used to license a faculty work in its policy, while only addressing the types of work affected by the policy in a footnote on the last page); University of Pennsylvania, *supra* note 105, 1 (stating under the heading of "Rights to Articles Submitted to Journals," that copyrights in articles vest initially in the author or the university or the sponsor. This is

What is probably most interesting about the study is that the data show that while academic freedom for individual professors seems to be slipping away in the court system, thereby reducing the chance that a teacher exception will be recognized again, references to academic freedom are actually on the rise in university copyright policies. Approximately 42% of university policies considered mention academic freedom now, as compared to only 26% ten years ago. The number of universities acknowledging that traditional academic works should be protected is also on the increase. Now 71% of universities disclaim traditional scholarly work, as opposed to 23% a decade ago.

Because the study does not account for the motives of universities in establishing their copyright policies, any explanation for this trend would have to be based on supposition. However, some legal scholars and even a few universities have noted that market conditions are probably a factor.¹⁵⁹ As the University of Chicago Copyright Policy points out, traditional scholarly works, on the whole, have never been particularly profitable.¹⁶⁰ The sheer expense of trying to manage all of the scholarly articles, monographs and academic books produced every year by faculty would likely outweigh

the extent of the university's explanation of its application of copyright to scholarly work.); and University of Chicago, *supra* note 105, at 52, 54 (stating that the university owns the copyright to intellectual property created under its auspices or with its resources, but that the university will not assert ownership until revenue generated from the work is substantial. The policy does not define substantial, or indicate how faculty could sell works that do not belong to them in order to reach a level of revenue that is substantial.).

¹⁵⁹E.g., Dreyfuss, *supra* note 3, at 642 ("The benefits – the financial reward that is available in the copyrights to scholarly production – are fairly low, except perhaps with respect to computer programs and textbooks. Thus, it is unlikely that the potential profits will ever outweigh the costs that a new regime would impose on the social fabric of the university. Even with regard to texts and software, it is unclear whether claiming copyright is worthwhile") and Simon, *supra* note 19, at 507-08 ("Most scholarly writing is geared to specialized journals which offer little or no payment...It is unlikely that many universities have a sufficiently large, distinguished, or popular publishing faculty to benefit greatly from ownership of faculty members' works").

¹⁶⁰University of Chicago, *supra* note 105, at 54 ("A small number of faculty have written standard texts and other works that earn substantial royalties. For most, however, the royalty and honoraria income is small and in many cases does not cover even out-of-pocket costs. Outside of a handful of faculty, royalty income from texts, whether print or electronic, does not cross the threshold where it would be appropriate for the University to assert ownership rights").

any profit that could be made from them. The real potential for money in copyrightable works comes from software, audiovisual materials and distance education courseware.¹⁶¹ These are works that normally require university resources for development – possibly explaining why almost 83% of universities list university support as the primary justification for their claim of faculty work. Also, these are projects that are often produced as works for hire. In the lexicon of university copyright policies, this usually means that the project is produced with university knowledge, in addition to the faculty member's normal academic duties or in lieu of them, and usually after a signed agreement has been executed stipulating who will own the eventual work. Again, this trend may explain why the number of universities claiming "assigned works," "commissioned works" and "works made for hire" is, on average, 18% higher than ten years ago.

Another possible reason to explain why universities seem to be more magnanimous in their copyright policies is that that they can afford to be. It is simply not clear whether university guarantees of copyright protection will hold up under law. Some scholars have noted that university policies may not be effective in altering copyright's presumption that a work produced within the scope of employment belongs to the employer, no matter how many times the policies cite academic freedom, disavow rights to traditional scholarly work, or define a work for hire as an assignment beyond a faculty member's normal scope of duty.¹⁶² This is because Section 201 of the Copyright Act

¹⁶¹See Daniel & Paukin, *supra* note 10, at 18 ("[A]s universities recognize the potential revenues inherent in the newest categories of copyrightable works – computer programs and other computer and media-created materials – more and more have begun adopting copyright policies"); and Lape, *supra* note 34, at 264-65 ("The interest taken by universities in faculty copyrights is primarily monetary, as demonstrated by the universities' interest in holding copyright in technologically complex works").

¹⁶²See Simon, *supra* note 19, 493 ("[O]ne thing is certain: once a court finds that a work was created within the course of employment, only an express, written, signed agreement between the employer and employee will suffice to rebut the presumption. Congress was clearly disturbed by the uncertainty resulting from courts' discussions of custom, intent, assumptions made by the parties, and other contract principles. These

provides that the employer or the person for whom the work is prepared is the author of a work made for hire "and, *unless the parties have expressly agreed otherwise in a written instrument signed by them*, owns all of the rights comprised in the copyright."¹⁶³ Only six of the policies included in the study referred to written agreements signed by the employee. None mentioned that a representative from the university had also signed. Without signatures from both parties, the policies might not alter the law.

Although in *Weinstein v. University of Illinois* the Seventh Circuit recognized a teacher exception to the work-for-hire doctrine based on the university's copyright policy, the court did so only because the copyright policy was mentioned in the professor's employment contract.¹⁶⁴ Again, many faculty members do not have contracts that specifically refer to their university copyright policies.

If university copyright policies fail to alter the work for hire doctrine's presumption that they are owners of faculty work, universities are in a winning position. They can afford to be generous in their policies. If it is not the case, they have protected themselves by securing the works that are likely to be the most profitable.

GUIDELINES FOR FACULTY WORKING IN A DIGITAL FORMAT

Because educators operating in the digital arena are most likely to generate work that draws the notice of technology transfer offices, they would do well to research the

subjective tests have been replaced by an objective test...."); Dan Burk, *Ownership of Electronic Course Materials in Higher Education*, 20 CAUSE/EFFECT 13 (1997) (visited March 23, 2001) <http://www.educause.edu/ir/library/html/cem9734.html> ("However, it is critical to remember that the assertions of institutions or of faculty are immaterial to the actual authorship of the works. Authorship is dictated by the copyright statute – private parties are not able to change the allocation created by Congress, even if that allocation is unclear."); and Harper, *supra* note 98, at 8 ("Since the work made for hire statute requires a signed writing to show an agreement to permit an employee to own copyright in a work to which the statute would otherwise apply, it would be prudent for university employment contracts to be signed by both parties and to include a reference to the universities policies.").

¹⁶³ 17 U.S.C. § 201 (emphasis added).

¹⁶⁴ 811 F.2d at 1094.

specifics of their university copyright policies. But there are also some general steps that faculty can take to improve their chances of maintaining control over their works. Following are guidelines for professors like those described in the introduction who fall into three general categories: a) those simply putting traditional instructional materials or articles online; b) those creating distance education courseware; and c) those creating software.

A) Putting traditional scholarly and education materials online.

Some professors have created Web sites that include course summaries and syllabi for students, or data from research that might interest colleagues. Others have used threaded discussion lists, chat rooms or news groups to supplement their sites.¹⁶⁵ But by doing this, some wonder if they are giving up their rights to the academic materials they post.¹⁶⁶

Copyright ownership is vested in the work itself, not the material object that embodies the work. Thus a book owner may own the book, but not the copyright to the book. Likewise, some commentators argue that in a situation in which a scholarly work appears on a university-owned Web site, ownership of the Web site is separate from the ownership of the copyright to the scholarly work.¹⁶⁷ But, considering the tenuous state of faculty copyrights in relation to the work-for-hire provision, it makes sense to wonder whether placing the scholarly work on the university server brings it "further away from the academic exception and closer to a university related writing."¹⁶⁸

¹⁶⁵ See Laughlin, *supra* note 20, at 555.

¹⁶⁶ See Jeffrey R. Young, *A Year of Web Pages for Every Course: UCLA Debates Their Value*, CHRON. OF HIGHER EDUC., May 15, 1998, at A29 (describing that faculty at UCLA have expressed concern that the university's initiative to create a Web page for every class offered might be followed by an attempt to claim ownership of any course materials on the network).

¹⁶⁷ See Borow, *supra* note 62, at 151.

¹⁶⁸ *Id.* at 165.

One issue to consider is whether the work is initiated by the faculty member or by the university. A work initiated by the university is likely to fall under the university's conception of a work made for hire.¹⁶⁹ A work that is initiated by the faculty member is more likely to fall under the clause most copyright policies include, protecting traditional academic writings.¹⁷⁰

Another issue to consider is whether the work is on the professor's official or unofficial Web site. "An official Web page is one created by the university to inform Web site visitors about their faculty's accomplishments and qualifications. In contrast, an unofficial Web page is one that the professor creates independently."¹⁷¹ If the professor creates the page and is solely responsible for all aspects of programming and content selection, she can argue that it falls outside of the scope of employment. If the university creates the page, participation of non-faculty members brings the work closer to the work-for-hire provision.

A related factor is that universities usually own their own servers. "One result of this ownership is that universities often have policies stating that all information and files saved on the server become the property of the university."¹⁷² A university policy claiming ownership of anything on its server does not meet the requirements of the Copyright Act's Sec. 201, requiring a written transfer of copyright signed by the copyright holder.¹⁷³ Of course, this is not a factor if the work is considered a work for hire.

The reason the work was prepared in the first place is also likely to have a bearing on a professor's copyright claim. If the work was prepared to aid in the teaching of a

¹⁶⁹ See *supra* notes 111-13 and accompanying text.

¹⁷⁰ See *supra* notes 124-33 and accompanying text.

¹⁷¹ Borrow, *supra* note 62, at 165.

¹⁷² *Id.* at 166.

¹⁷³ See *id.* at 168.

class, or as a requirement for tenure, the university's claim to it is stronger. This goes back to the Restatement of Agency test, defining what falls within an employee's scope of employment. It is safer to post work done in addition to what is required for tenure and promotion, or if that seems unrealistic, work done outside work periods, for example, over the summer, which is generally outside of the nine-month contract period.

A final consideration would be whether the faculty member posts the material for everyone to see, or requires a password or other limiting device to screen access to the materials.¹⁷⁴ Faculty who attempt to protect access to their work have a better argument to claim that it was never intended for general use.

B) Developing online courseware for distance education.

More than just offering class resources online, many professors are now offering entire classes online as a form of distance education.¹⁷⁵ Distance education has the potential to meet the needs of nontraditional students who are unable to come to campus. Tapping into this new market may generate billions of dollars for universities.¹⁷⁶ But it also can be very expensive for universities in terms of startup costs. If a university invests heavily in courseware, it is likely to claim it.

At the same time, a lot of work goes into the creation of an online course. Faculty generally use content from the courses they teach in the offline world. Many feel they should own their work, profit from it and be able to take it with them when they leave to work at another institution.

¹⁷⁴See Holmes & Levin, *supra* note 47, at 188.

¹⁷⁵See U.S. COPYRIGHT OFFICE, *supra* note 1, at 10 (defining distance education as "the delivery of instruction with a teacher active in determining pace and content, as opposed to unstructured learning from resource materials").

¹⁷⁶See Press & Washburn, *supra* note 95, at 34 (citing a Merrill Lynch estimate that the virtual learning market will be worth \$7 billion by 2003).

The defining factor in who owns the course is likely to be whether the teacher or professor was specifically assigned to develop the course. If so, the university will probably regard it as a work for hire. Likewise, if the faculty member accepted extra compensation or release time to prepare the course, the university is likely to claim it as a work for hire. This is significant, not only because the copyright goes to the university, but also because most universities do not share royalties with authors of works for hire.

A university is also likely to claim courseware if the university has contributed resources to it in the form of salary, office space, computer time and secretarial support.¹⁷⁷ Others will move in only if the support has been substantial, usually defined as support that goes beyond what the normal faculty member is given.¹⁷⁸ But, unlike faculty who generate works for hire, faculty members who work on their own initiative with university support are normally entitled to a share of profit from sale or licensing.¹⁷⁹

Faculty who are able to generate courseware on their own, without any university support, generally will be allowed to keep the copyright to it.¹⁸⁰ Still, some university policies claim technology created within the scope of the creator's employment, regardless of resources used,¹⁸¹ or demand a royalty-free license to use any educational material developed.¹⁸²

¹⁷⁷See *supra* note 104-06 and accompanying text.

¹⁷⁸See *supra* note 107-08 and accompanying text.

¹⁷⁹See *supra* note 134-35 and accompanying text.

¹⁸⁰E.g., Colorado State University, *supra* note 105, at 7 (stating that academic materials prepared without university resources may be placed on the university Web site without university exploitation of those materials).

¹⁸¹E.g., Oregon State University, *supra* note 105, at 2 (claiming educational materials "that result from the instructional, research or public service activities of the institutions") and University of Arizona, *supra* note 105, at 6 (stating that if intellectual property is developed by an employee within his or her area of expertise or responsibility, then it is owned by the university. The policy adds that determination of ownership is not dependent on the person's physical location.).

¹⁸²E.g., Duke University, *supra* note 105, at 2 (claiming a license to immediate course content owned by instructors that gives it the right to offer the course or derivatives in distance education projects via the Internet whether at Duke or elsewhere).

C) Developing software.

Some faculty are inspired to develop software to aid them in teaching particular subjects. Others simply want to express their own creativity and are hoping to profit from their work. Software can be protected by a copyright or patent. Copyrights are more common, however, because they are easier to come by. Software has to be "novel" to earn a patent, but copyright applies the moment it is produced as long as a modicum of creativity is involved.

Colleges almost always assert ownership over patented software, but many are still testing the water where copyrighted software is concerned. Traditionally, colleges have allowed professors to keep the copyright to their creative works, but when those creative works come in the form of software, they are potentially more profitable and thus more tempting to claim. Some colleges have adopted policies claiming ownership of almost all faculty-generated software; others consider it to be the property of the professor who created it.¹⁸³

Professors who create software are on firmer footing if the software is simply a mechanism to express other scholarly or creative work. Software falling into this category is sometimes shielded under provisions protecting traditional scholarly work, no matter the format in which it is presented. On the other hand, software that is useful for purposes other than conveying traditional literary work is more likely to fall into the "device-like" category for software. If this is the case, a university is likely to claim it,

¹⁸³See Scott Carlson, *When Professors Create Software, Do They Own It, Or Do Their Colleges?* CHRON. OF HIGHER ED., July, 21, 2000, at A29 (noting that Carnegie Mellon University, for example, claims ownership of software if it was created with the help of university facilities. But University of Washington and Stanford University, which assert ownership over patentable software, "won't touch copyrightable software unless it was produced through a grant-funded research program, assigned to the professor, or produced through substantial use of university resources").

particularly if it is in any way related to the professor's area of specialty or if any university resources were used in its creation.¹⁸⁴

Professors should be particularly careful about how their software is created. Copyright ownership is based on authorship. Even though a professor generates the idea for the software, if she hires someone else to write the program, the copyright might belong to the programmer.¹⁸⁵ It would be wise to set up an agreement stipulating copyright ownership before beginning to work on the code.

CONTRACT FOR PROTECTION

As long as there is doubt regarding the existence of a teacher exception to the work for hire doctrine, faculty would be wise to protect themselves with written agreements that preserve their copyright to their scholarly work. Professors will acquire maximum protection from an agreement stating that "the faculty member's writings are not considered works for hire and are not produced in the course of employment."¹⁸⁶ Some university policies grant faculty the right to retain the copyright to their writings. But faculty should not be lulled into complacency by beneficial "statements of [copyright] policy in various university bylaws, operating guidelines, and regulations."¹⁸⁷ Legally, there is some question as to whether a written university policy "satisfies the section 204(a) requirement of a writing signed by the professor, or the section 201(b)

¹⁸⁴See *id.* (describing the pains one William and Mary law professor is taking to shield his work to ensure that it does not appear to be "part of the scope of his employment." Trotter Hardy is designing Web-based scheduling software he hopes will one day be profitable. With the work-for-hire provision in mind, he has been very careful to select a project that is not related to his teaching, to program the software himself, to work on his home computer, to pay for his own Internet access and eschew college resources. He is even careful to delete any e-mail regarding his software that might be sent to him at work.).

¹⁸⁵See *id.*

¹⁸⁶Simon, *supra* note 19, at 509.

¹⁸⁷*Id.* at 513.

requirement of a writing signed by the professor and the university."¹⁸⁸ In this case, faculty might pursue the strategy of incorporating a reference to the beneficial policy into an agreement signed by themselves and the university.¹⁸⁹

CONCLUSION

Under the Copyright Act's work-for-hire provision, faculty works appear to belong to the universities that employ them. The teacher exception to the work-for-hire provision, a common law doctrine that secured professors' rights to their works, once offered many advantages. Primary among them was that the teacher exception helped ensure academic freedom by allowing faculty to retain control over the form of their work, the forum for it and any possible derivative works that might ensue.¹⁹⁰ However, legal scholars and courts have expressed doubt that the exception still exists. Moreover, courts now seem to be rejecting the concept of academic freedom as an individual right of university professors, which in a circular manner, further weakens the concept of a teacher exception.

Meanwhile, university policies are claiming some faculty works, while disclaiming others. Many universities protect faculty rights to their traditional scholarly work in their copyright policies. But the efficacy of these policies is also in doubt because the law requires a signed agreement by both parties to alter the traditional work for hire arrangement. In a copyright dispute, courts might consider the traditional custom of assigning faculty rights to their scholarly work to be determinative, but this does not appear to be the legislative intent behind the law. Legally, the best option faculty have to protect their work is to pursue contracts with their employers securing their copyrights. Without them universities will continue to claim at least some of their works.

¹⁸⁸Lape, *supra* note 34, at 248.

¹⁸⁹See Borow, *supra* note 62, at 168.

When universities own the copyrights to faculty work, they possess the corollary right to suppress that work and to prevent faculty from revising it or producing derivatives from it.¹⁹¹ The fact that universities have that power, whether they choose to exercise it or not, weakens the very foundation of academic freedom and freedom of speech. "Faculty writings often have instigated or propelled changes in the law and societal attitudes. Controversial scientific opinions later have been accepted in the general scientific community."¹⁹² This might not have been the case if universities, concerned by the reactions of alumni, students or contributors, attempted to suppress faculty views by restricting access to their work.

¹⁹⁰See Laughlin, *supra* note 20, at 578.

¹⁹¹See *id.*

¹⁹²*Id.*

Appendix A

Boston University
California Institute of Technology
Carnegie-Mellon University
Case Western Reserve University
Colorado State University
Columbia University
Cornell University
Duke University
Georgia Institute of Technology
Harvard University
Howard University
Indiana University at Bloomington
Johns Hopkins University
Louisiana State University
Massachusetts Institute of Technology
Michigan State University
New Mexico State University
New York University
North Carolina State University
Northwestern University
Ohio State University
Oregon State University
Pennsylvania State University
Princeton University
Purdue University
Rockefeller University
Rutgers University
Stanford University
State University of New York at Stony Brook
Texas A&M University
University of Arizona
University of California at Berkeley
University of California at Davis
University of California at Irvine
University of California at Los Angeles
University of California at San Diego

University of California at San Francisco
University of Chicago
University of Cincinnati
University of Colorado at Boulder
University of Connecticut
University of Florida
University of Georgia
University of Hawaii at Manoa
University of Illinois at Chicago
University of Illinois at Urbana-Champaign
University of Iowa
University of Kentucky
University of Maryland at College Park
University of Miami
University of Michigan at Ann Arbor
University of Minnesota - Twin Cities
University of Missouri at Columbia
University of New Mexico
University of North Carolina at Chapel Hill
University of Pennsylvania
University of Pittsburgh
University of Rochester
University of Southern California
University of Tennessee at Knoxville
University of Texas at Austin
University of Utah
University of Virginia
University of Washington
University of Wisconsin at Madison
Virginia Polytechnic Institute and State University
Vanderbilt University
Washington University
Yale University
Yeshiva University